United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

ORIGINAL

76-1592

B
P/S

United States Court of Appeals
For the Second Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-against-

HARRY HOFFER,
Defendant-Appellant.

On Appeal From The Denial
Of A Motion For A New Trial
By The United States District Court
For The Southern District Of New York

APPENDIX TO THE BRIEF OF APPELLANT HARRY HOFFER

RALPH S. NADEN
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UNITED STATES COURT OF APPEALS
FILED
JAN 21 1977
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SECOND CIRCUIT

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INDICTMENT.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

- -X

UNITED STATES OF AMERICA,

v.

JOHN JOSEPH FRANK, ALFRED J. HEMLOCK, HARRY HOFFER, STEPHEN BORGMAN, a/k/a Steve Miller, a/k/a Stephen Berman, MAURICE S. HEBERT, and A. ARTHUR KAY, a/k/a Aaron Arthur Klians Kay,

Defendants.

72 Cr.

- -X

The Grand Jury charges:

1. From on or about the first day of January, 1967, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, JOHN JOSEPH FRANK, ALFRED J. HEMLOCK, HARRY HOFFER, STEPHEN BORGMAN, a/k/a Steve Miller, a/k/a Stephen Berman, MAURICE S. HEBERT, and A. ARTHUR KAY, a/k/a Aaron Arthur Klians Kay, the defendants and others to the Grand Jury unknown, unlawfully, willfully and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 1341, 1342, 1343 and 2314 of Title 18, United States Code.

2. It was a part of said conspiracy that the said defendants unlawfully, wilfully, and knowingly would devise and intend to devise a scheme and artifice to defraud Miria de Los Angles Trujillo de Dominguez and PLANINVEST, Planing and Investing Company, S. A., a Luxembourg corporation owned and controlled by her, hereinafter collectively referred the "person to be defrauded", and to obtain money and property therefrom by means of false and fraudulent pretenses, representations and promises.

3. It was further a part of said conspiracy that the said defendants unlawfully, wilfully, knowingly and for the purpose of conducting, promoting and carrying on by means of the Postal Service, a scheme and artifice, unlawful under Section 1341 of Title 18, United States Code, would use, assume, and request to be addressed by fictitious, false and assumed titles, names, and addresses other than their own proper names.

4. It was further a part of said conspiracy that the said defendants, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false fraudulent pretenses, representations and promises and for the purpose of executing such scheme and artifice, unlawfully,

wilfully and knowingly would transmit and cause to be transmitted by means of mail, wire, radio and television communications in interstate and foreign commerce, writings, signs, signals, pictures and sounds.

5. It was further a part of said conspiracy that the said defendants unlawfully, wilfully, knowingly and in the execution and concealment of a scheme and artifice to defraud, would transport and cause to be transported in interstate and foreign commerce, money, property and securities of the value of $5,000 or more, knowing the same to have been stolen, converted and taken by fraud.

6. Among the means by which the defendants would and did carry out the said conspiracy and scheme were the following:

a. During the summer and fall of 1967, the defendants met together to formulate and scheme by which "the person to be defrauded" would be induced to repose confidence in those of the defendants who would be performing services on her behalf, both as attorneys and otherwise.

b. During the late fall of 1967, JOHN J. FRANK and STEPHEN BORGMAN, a/k/a Steve Miller, a/k/a Stephen Berman, the defendants, by false and fraudulent representations, induced the "person to be defrauded" to undertake the purchase of foreign real estate for investment purposes.

BEST COPY AVAILABLE

c. On or about January 11, 1968, the defendants caused title to a Montreal, Quebec, parcel of property to be transferred from them to the "person to be defrauded" in exchange for the sum of $778,500.00, knowing full well that said parcel was then worth less than one-tenth of that amount.

d. On or about February 5, 1968, the defendants caused title to a second parcel in Montreal, Quebec, to be transferred from them to the "person to be defrauded" in exchange for the sum of $361,500, knowing full well that said parcel was then worth less than one-tenth of that amount.

e. In and about the spring and summer of 1968, the defendants met together to formulate the scheme by which further such purchases would be induced, until their complicity was discovered by the "person to be defrauded."

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York and elsewhere:

INDICTMENT

1. On or about January 8, 1968, ALFRED J. HEMLOCK, JOHN JOSEPH FRANK, STEPHEN BORGMAN, a/k/a Steve Miller, a/k/a Stephen Berman, and HARRY HOFFER did assume the names of Columbia Corporation Limited and Splindian Invistments Limited.

2. On or about both the 10th and 12th days of January, 1968, ALFRED J. HEMLOCK, JOHN JOSEPH FRANK, STEPHEN BORGMAN, a/k/a Steve Miller, a/k/a Stephen Berman, HARRY HOFFER, MAURICE S. HEBERT and A. ARTHUR KAY, a/k/a Aaron Klians Kay, did transport and cause to be transported in interstate and foreign commerce fraudulently obtained securities and their proceeds having a value in excess of $5,000.

3. On or about January 15, 1968, HARRY HOFFER wrote a letter.

4. On or about January 25, 1968, HARRY HOFFER wrote a letter.

5. On or about the 4th and 6th days of February, 1968, ALFRED J. HEMLOCK, JOHN JOSEPH FRANK, STEPHEN BORGMAN, a/k/a Steve Miller, a/k/a Stephen Berman, HARRY HOFFER, A. ARTHUR KAY, a/k/a Aaron Klians Kay, did transport and cause to be transported in interstate and foreign commerce fraudulently obtained securities and their proceeds having a value in excess of $5,000.

INDICTMENT

6. On or about the 1st day of June, 1968, HARRY HOFFER and JOHN JOSEPH FRANK did assume and use the false and fictitious name Splindian Investments Limited.

7. On or about the 3rd day of July, 1968, ALFRED J. HEMLOCK and HARRY HOFFER traveled to 50 Greenway South, Forest Hills, New York to a meeting with the "person to be defrauded".

8. On or about the 12th day of August, 1968, ALFRED J. HEMLOCK and HARRY HOFFER traveled to 50 Greenway South, Forest Hills, New York to a meeting with the "person to be defrauded".

9. On or about the 4th day of September, 1968, ALFRED J. HEMLOCK, did mail and cause to be mailed a letter instructing the Bank of London and South America, Ltd., New York branch, to release its records concerning the "person to be defrauded".

10. On or about the 20th day of September, 1968, ALFRED J. HEMLOCK and HARRY HOFFER traveled to 50 Greenway South, Forest Hills, New York to a meeting with the "person to be defrauded".

11. On or about the 23rd day of September, 1968, ALFRED J. HEMLOCK, JOHN JOSEPH FRANK, and STEPHEN BORGMAN, a/k/a Steve Miller, a/k/a Stephen Borman attending a meeting in New York City with the "person to be defrauded".

INDICTMENT

(Title 18, United States Code, Section 371).

SECOND THROUGH FIFTH COUNTS

The Grand Jury further charges:

On or about the dates hereinafter set forth in counts two through five of this Indictment, in the Southern District of New York, JOHN JOSEPH FRANK, ALFRED J. HEMLOCK, HARRY HOFFER, STEPHEN BORGMAN, a/k/a Steve Miller, a/k/a Aaron Arthur Klians Kay, the defendants and others to the Grand Jury unknown, unlawfully, wilfully, knowingly, and having devised the scheme and artifice alleged in this Indictment to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, did, in the execution and concealment of said scheme and artifice, transport and cause to be transported in interstate and foreign commerce, securities, money, and property having a value of $5,000 or more, knowing the same to have been stolen, converted and taken by fraud, as follows:

COUNT	DATE	VALUE	FROM	TO
2	January 11, 1968	$778,500	New York N. Y.	Nassau Bahamas
3	January 12, 1968	$778,500	Nassau Bahamas	New York N. Y.
4	February 4, 1968	$361,500	New York N. Y.	Nassau Bahamas
5	February 5, 1968	$361,500	Nassau Bahamas	New York N. Y.

(Title 18, United States Code, Section 2314)

The Grand Jury further charges:

1. From on or about the 1st day of January, 1967, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, JOHN JOSEPH FRANK, ALFRED J. HEMLOCK, HARRY HOFFER, STEPHEN BORGMAN, a/k/a Steve Miller, a/k/a Stephen Berman, MAURICE S. HEBERT, and A. ARTHUR KAY, a/k/a Aaron Arthur Klians Kay, the defendants and others to the Grand Jury unknown, unlawfully, wilfully, knowingly and for the purpose of conducting, promoting and carrying on by means of the Postal Service the scheme, artifice and otherwise unlawful business as alleged in this Indictment in violation of Sections 1341 and 1343 of Title 18, United States Code, did use and assume and request to be addressed by a fictitious, false, and assumed title, name and address, and name other than his own proper name.

2. It was further a part of said scheme, artifice and otherwise unlawful business as alleged in this indictment that the said defendants used Bahamian corporate personages, to wit, Columbia Corporation Limited and Splindian Investment Limited, to effect the transfer of title to real property located in Canada by concealing the true nature of their interests in that property from the "person to be defrauded".

3. On or about the dates hereinafter set forth counts 6 and 7 of this Indictment, in and through the South District of New York, JOHN JOSEPH FRANK, ALFRED J. HEMLOCK, HARRY HOFFER, STEPHEN BORGMAN, a/k/a Steve Miller, a/k/a Stephen Berman, MAURICE S. HEBERT and A. ARTHUR KAY, a/k/a Aaron Arthur Klians Kay, the defendants and others to the Grand Jury unknown, unlawfully, wilfully and knowingly and for the purposes hereinbefore alleged in paragraphs 1 and 2 above, did use and assume the following names:

INDICTMENT

COUNT	DATE	NAMES
6	January 11, 1968	Columbia Corporation Ltd. Herbert M. Lefkowitz, Anthony C. Hepburn, and Celia E. Neill.
7	February 5, 1968	Splindian Investments Ltd., Herbert M. Lefkowitz, Anthony C. Hepburn, and Celia E. Neill.

(Title 18, United States Code, Section 1342)

EIGHTH THROUGH SIXTEENTH COUNTS

The Grand Jury further charges:

1. From on or about the 1st day of January, 1967, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, JOHN JOSEPH FRANK, ALFRED J. HEMLOCK, HARRY HOFFER, STEPHEN BORGMAN, a/k/a Steve Miller, a/k/a Stephen Berman, MAURICE S. HEBERT, and A. ARTHUR KAY, a/k/a Aaron Arthur Klians Kay, the defendants and others to the Grand Jury unknown, unlawfully, wilfully and knowingly did devise and intend to devise a scheme and artifice to defraud and for obtaining money and property from the "person to be defrauded" by means of false and fraudulent pretenses, representations and promises.

2. It was further a part of said scheme and artifice that the "person to be defrauded" was induced to rely on and repose special confidence in ALFRED J. HEMLOCK, JOHN JOSEPH FRANK, HARRY HOFFER and MAURICE S. HEBERT, the defendants, each of whom acted as attorney for the "person to be defrauded".

3. It was further a part of said scheme and artifice that JOHN JOSEPH FRANK and STEPHEN BORGMAN, a/k/a Steve Miller, a/k/a Stephen Berman, the defendants, induced the "person to be defrauded" to purchase real property located in Canada by means of false and fraudulent pretenses, representations and promises, to wit, that said real property would be and was worth what was paid when, in actuality, it was then worth less than one-tenth of that amount.

4. It was further a part of said scheme that ALFRED J. HEMLOCK, JOHN JOSEPH FRANK, STEPHEN BORGMAN, a/k/a Steve Miller, a/k/a Stephen Berman, and HARRY HOFFER, the defendants, induced the "person to be defrauded, to purchase said real property by means of false and fraudulent pretenses, representations and promises, to wit, the continued failure to disclose the fact that each was an officer of the corporate transferors of said real property to "the person to be defrauded".

5. On or about the dates hereinafter set forth in counts eight through sixteen of this Indictment, in the Southern District of New York, JOHN JOSEPH FRANK, ALFRED J. HEMLOCK, HARRY HOFFER, STEPHEN BORGMAN, a/k/a Steve Miller, a/k/a Stephen Berman, MAURICE S. HEBERT, and A. ARTHUR KAY, a/k/a Aaron Arthur Klians Kay, the defendants and others to the Grand Jury unknown, unlawfully, wilfully and knowingly and for the purposes hereinbefore alleged in paragraphs 1 through 4 above, and attempting so to do, did place in a post office and authorized depository for mail matter, take and receive therefrom, and cause to be delivered by mail according to the direction thereon, certain letters addressed as indicated, and did transmit and cause to be transmitted by means of wire and radio communications in interstate and foreign commerce, certain telegrams and telephone calls, addressed as indicated:

UNT	MEANS	DATE	ADDRESSOR	ADDRESSEE
8	Telephone	January 2, 1968	ALFRED J. HEMLOCK 250 Broadway New York, N. Y. #1007	Irving L. Adessky 1255 rue University Street, Montreal 110, Que.
9	Telegram	January 8, 1968	Bank of London and South America New York, N. Y.	Bank of London and South America London, England

INDICTMENT

NT	MEANS	DATE	ADDRESSOR	ADDRESSEE
	Telegram	January 10, 1968	Bank of London and South America London, England	Bank of London and South America New York, N. Y.
	Telephone	January 12, 1968	Irving L. Adessky Emerald Beach Hotel Nassau, Bahamas	ALFRED J. HEMLOCK 250 Broadway New York, N. Y.
2	Mail	January 15, 1968	HARRY HOFFER 250 Broadway New York, N. Y. 10007	Solomon & Malus 407 McGill Street Montreal, Canada
3	Mail	January 25, 1968	HARRY HOFFER 250 Broadway New York, N. Y.	Solomon & Malus 407 McGill Street Montreal, Canada
4	Telegram	February 1, 1968	Bank of London and South America New York, N. Y.	Bank of London and South America London, England
5	Telegram	February 2, 1968	Bank of London and South America London, England	Bank of London and South America New York, N. Y.
6	Mail	September 4, 1968	ALFRED J. HEMLOCK 250 Broadway New York, N. Y.	Bank of London and South America, Ltd. P. O. Box 241 40-66 Queens Victoria Street London E. C. 4 84 William Street New York, N. Y. #10038

(Title 18, United States Code, Sections 1341 and 1343).

WHITNEY NORTH SEYMOUR, JR.
United States Attorney

IRENE McITAST
Foreman

MacDonald, AUSA — 14 — PG. ACK, J.

JUDGMENT AND COMMITMENT (Rev. 2-68) — Cr. Form No. 23a

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

United States of America
v.
[illegible] — No. 72 CR 1365 MP

On this 11th day of September 1973 came the attorney for the government and the defendant appeared in person and by James La Pella, Esq.

IT IS ADJUDGED that the defendant upon his plea of of not guilty and a verdict of guilt by a jury has been convicted of the offense of wilfully and knowingly, pursuant to an unlawful scheme to defraud, transported or caused to be transported in interstate commerce money in excess of $5,000. knowing the same to have been converted and taken by fraud. (Title 18, U.S. Code, Section 2314.); wilfully & knowingly to carry out by means of the Postal Service the unlawful scheme to defraud used and was addressed by a fictitious, false and assumed title other than his own proper name.(Title 18 U.S. Code, Section 1342.); unlawfully, wilfully & knowingly did devise and intend to devise a scheme and artifice to defraud and for obtaining money and property from the "person to be defrauded" by means of false and fraudulent pretenses, representations and promises. (Title 18, U.S. Code, Sections 1341 and 1343.); conspiracy so to do. (Title 18, U.S. Code, Section 371.)

as charged in counts 1 to 7 incl. & cts. 12 & 13.

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of: TWO (2) years on each of counts 1 to 7 inclusive to run concurrently with each other. ONE (1) year on each of counts 12 and 13 to run concurrently with each other but CONSECUTIVELY to the sentence on counts 1 to 7 inclusive.

Pursuant to the provisions of Section 4208 (a) (2), Title 18, U.S. Code, the defendant shall become eligible for parole at such time as the Board of Parole may determine. Defendant is continued on present bail, pending appeal.

IT IS ADJUDGED that:

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

MILTON POLLACK
United States District Judge.

The Court recommends commitment to:

RAYMOND F. BURGHARDT
Clerk.

A True Copy. Certified this 11th day of September, 1973

(Signed) Raymond F. Burghardt *Clerk.* (By) [illegible] *Deputy Clerk.*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

-against-

HARRY HOFFER,

Defendant-Petitioner.

----------X

72 Cr. 1365 (M.P.)

NOTICE OF MOTION FOR NEW TRIAL PURSUANT TO RULE 33, F.R.Cr.P.

S I R S:

PLEASE TAKE NOTICE, that upon the annexed affidavits of RALPH S. NADEN, attorney for the defendant-petitioner herein, of HARRY HOFFER, of STEVEN BERMAN, of JOHN FRANK, and upon other materials annexed thereto and submitted therewith, and upon the entire record of the case, the defendant will move this Court, at a time and place to be set by the Court, the Honorable Milton Pollack thereof, for an order pursuant to Rule 33, Federal Rules of Criminal Procedure, for an order setting aside the conviction herein and granting a new trial, or for whatever other and further relief which to this Court may seem just and proper.

Dated: October 11, 1976
New York, N.Y.

YOURS, ETC.,

RALPH S. NADEN
Attorney for Defendant-
Petitioner
253 Broadway
New York, N.Y. 10007
(212) 964-1998

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA,

- against -

HARRY HOFFER,

Defendant.
----------X

72 Cr. 1365 (M.P.)

AFFIDAVIT OF COUNSEL IN SUPPORT OF MOTION FOR NEW TRIAL PURSUANT TO RULE 33, FEDERAL RULES OF CRIMINAL PROCEDURE.

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

RALPH S. NADEN, being duly sworn, deposes and says, upon information and belief, except as otherwise stated:

1. I am the attorney for the petitioner herein, having been retained to represent him for purposes of bringing this motion for a new trial pursuant to Rule 33, Federal Rules of Criminal Procedure.

2. Mr. Hoffer was unjustly convicted of a conspiracy to defraud Maria Trujillo Dominguez, the daughter of the late dictator of the Dominican Republic in 1973. The scheme involved a fraud based upon a purchase of Canadian land at a price ten times its actual value.

3. Mr. Hoffer's sole involvement in this case was as an employee in the law firm which performed legal services for Mrs. Dominguez relative to these transactions. He never attended any meetings where the purchase of Canadian land was discussed. Mrs. Dominguez admitted that she hardly knew Hoffer. And erroneous, false testimony by bank officials Latvis and Reilly linked Hoffer with the proceeds of the crime. Hoffer was said to have had access to time deposit accounts in which the proceeds of the swindle were maintained and from which they were distributed. Latvis and Reilly stated that Hoffer, Hemlock, and Frank, all co-defendants in the case, broke the time deposits and withdrew some $600,000 in cash. This testimony was completely inaccurate and untrue with regard to Hoffer.

4. All defendants were tried before the Hon. Milton Pollack and a jury in June, 1973, and were found guilty. Hoffer was convicted of conspiracy, several counts of mail fraud, using a fictitious name, and transporting in foreign commerce securities fraudulently obtained. The other defendants were also convicted.

5. Appeal was taken and the conviction upheld by our Court of Appeals. United States v. Frank, 594 F. 2d. 145 (2d. Cir., 1974). The Supreme Court of the United States denied certiorari on October 14, 1974. Hoffer v. United States, 419 U. S. 828 (1974).

GROUNDS OF THE MOTION

6. This motion has two separate, though connected, bases. First is the ground of newly discovered evidence, in the pure sense. After the trial was completed and during subsequent disbarment proceedings, documentary proof was acquired that demonstrated that Mr. Hoffer did not have access to the time deposit accounts in which the fruits of the fraudulent scheme were maintained, and could not have withdrawn money from those accounts. This document absolutely refutes the Latvis-Reilly testimony. See the annexed memorandum of law, which treats the evidentiary questions more thoroughly than this affidavit anticipates doing.

7. The additional ground is that Hoffer was denied the effective assistance of counsel in his defense. He was represented by James LaRossa, Esq., who - according to

the annexed affidavits of co-defendants Steven Berman and John Frank - was paid by Alfred Hemlock, and who was requested to keep Hoffer off the witness stand because Hoffer would have furnished testimony that would have buttressed the government's case against Alfred Hemlock and would have exculpated himself. This raises a deeply troubling question, going as it does to the heart of the relationship of confidence and trust that should occur between attorney and client. It is Mr. Hoffer's position that for the reasons set forth in the Berman-Frank affidavits, and because his attorney was paid by the co-defendant, no case was put in for him at all, in a matter in which there was a substantial defense case to be made.

HOFFER'S DEFENSE CASE

8. Mr. Hoffer's defense, in substance, is and was that he was an employee of Hemlock, acting under the direction and supervision of his employer. As such, he did participate

in certain land transactions at his employer's request, but without any knowledge that these transactions were part of a fraudulent scheme in which Hemlock was a main participant. He describes significant evidence that would have exonerated him, as he was exonerated in subsequent disbarment proceedings:

a. the testimony of Kenneth Becker, Esq., another partner in the Hemlock firm, who would hae testified - and did testify at disbarment proceedings - that notwithstanding the appearance of a law partnership, the Hemlock-Hoffer relationship was primarily one of employer-employee, and that Hoffer acted under Hemlock's direction. Becker would also have testified that Hemlock had told him the same thing about the Dominguez transactions that he told Hoffer, that these transactions were payment for unusual legal services performed.

b. the testimony of Sidney Blumenberg, an accountant, who testified that he was not present with Hoffer at a discussion with Mrs. Dominguez about Canadian land deals, and that Mrs. Dominguez was mistaken in her recollection of that alleged event;

c. his own exculpatory testimony, describing the work he did on the Dominguez case at the direction of his employer, Alfred Hemlock, but without any guilty knowledge; he would also have been able to testify that he did not participate in breaking time deposit bank accounts;

d. a written partnership agreement between Hemlock and Hoffer and Becker, made in 1969 - one year after the criminal event in question - in which the disposition of pending law firm cases was made. That partnership agreement, annexed to these papers, specifically reserved to Alfred Hemlock the sole right to any funds accruing from the Dominguez account, giving no rights whatsoever to Mr. Hoffer.

MR. HOFFER WANTED TO TESTIFY

9. All parties have always agreed that Mr. Hoffer wanted to testify in his own defense at the trial, and that Mr. LaRossa persuaded him not to testify. At disbarment proceedings, Mr. LaRossa testified that

> "I recommended to Mr. Hoffer that he not take the stand in his own defense for a number of reasons.
>
> The first is that I had very serious doubts about whether his implication within the conspiracy had been pro d to a legal satisfaction.
>
> In addition to that, I believed that even if the Judge did send the case to a jury, the jury would have difficulty in believing the testimony of the complainant.
>
> The third reason is that Mr. Hoffer was, in my opinion, a nervous individual, and based upon his nervousness, I did not think that he would be presented to a jury in as good a fashion as he did when he was having a conversation with two or three individuals. For those reasons, I strongly suggested that Mr. Hoffer not take the stand in his own defense. Transcript, Disbarment Proceedings, In the Matter of Harry Hoffer, at p. 727. Appellate Division, Supreme Court of the State of New York.

10. Acknowledging that Hoffer wanted to testify, and anticipated testifying, Mr. LaRossa stated that

"My recollection is that at one point, and I think at that point he did wish to testify as to those events. But again, unfortunately, I thought the case was going to wind up differently.

I gave him my suggestions as strong as I could and I assumed he followed them based upon the fact that he thought my experience and expertise should be the deciding factor in the case. Transcript, at p. 729.

11. In testifying about whether he persuaded Hoffer not to testify, Mr. LaRossa said that about

"the question of persuasion, though, I believe that I was strong enough in my suggestion to him that I didn't give him much room for serious argument.

I think he respected my judgment at that point, whether it be in error or not. He did tell me that he thought he should take the stand and wanted to take the stand....".

CRITICAL ISSUE PRESENTED TO THE COURT

Thus, the Court is presented with an issue of the highest importance and of the most volatile nature. The question is whether Mr. LaRossa's professional decisions were based upon objective considerations, judgment, and evaluation of the case, or whether the decisions were founded upon the factors enumerated in the Berman and Frank affidavits. The affidavits of Frank and Berman are troubling indeed, and it is Mr. Hoffer's position that the material contained in them show the fabric, the motive,

and the reason, why no defense case was presented at all, when a strong one indeed could have been made.

WHEREFORE, the petitioner HARRY HOFFER respectfully requests that the Court set aside his conviction herein, grant him a new trial in the matter, and grant whatever other and further relief which to this Court may seem just and proper.

Dated, October 8th, 1976

New York, N. Y.

RALPH S. NADEN

Ralph Naden

Attorney for Harry Hoffer

Sworn to before me this

8th day of October, 1976

David Portnoy

DAVID PORTNOY
Notary Public, State of New York
No. 24-4618623
Qualified in Kings County
Commission Expires March 30, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

-against-

HARRY HOFFER,

Defendant-Petitioner.

----------X

72 Cr. 1365 (M.P.)

AFFIDAVIT IN SUPPORT OF MOTION PURSUANT TO RULE 33, F.R.Cr.P.

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

HARRY HOFFER, being duly sworn, deposes and says:

1. I am the defendant named herein, having been indicted in 1972 and tried in June, 1973, for allegations relating to a fraud committed upon Maria Trujillo Dominguez. I was convicted after a jury trial conducted before the Honorable Milton Pollack, United States District Judge in the Southern District of New York, and received a sentence.

2. Being the moving party in this motion, I respectfully request that the Court consider the following materials in ruling upon the motion:

a. affidavits of co-defendants John Frank and Steven Berman, affidavits of myself and of counsel, the memorandum of

partnership agreement executed by myself, Alfred Hemlock, Irving List, and Kenneth Becker, the testimony elicited at Bar Association disciplinary proceedings against me, (See In the Matter of Harry Hoffer, New York Law Journal, May 26, 1976), the report of Referee George Trosk, Esq., made at the termination of those proceedings, and documents relating to time deposit bank accounts at the First National City Bank, Nassau Branch, Bahamas, of the Columbia and Splindian Corporations. These last documents demonstrate that I did not have access to the time deposit accounts in which the proceeds of the fraudulent scheme were held.

The Onset of Proceedings

3. My awareness of the criminal aspects of this case started in approximately August of 1972, at which time I learned that I and others were targets of a grand jury inquiry. In September, 1972, Alfred Hemlock advised me that we would both require legal representation during that investigation. He planned to retain Michael Direnzo, Esq., to represent his interests; he told me that Direnzo had recommended James LaRossa, Esq., a former Assistant United States Attorney, to represent me. I was told that Mr. LaRossa specialized in federal

criminal defense work. Hemlock stated to me that since he was primarily involved and had made money on the Dominguez transactions, whereas I had not profited at all, he would assure payment for the legal services that I would require. He told me that he would approach co-defendants Steven Berman and John Frank to see if they would contribute toward the cost of my lawyer's services.

4. Hemlock and I consulted with Mr. LaRossa, who indicated that his fee would be $15,000. Mr. Hemlock agreed, and told Mr. LaRossa that he would represent me. I paid no money at all for those legal services; I believe that Mr. Hemlock paid the full costs on my behalf.

Trial Preparation

5. After I was indicted, trial preparation began. I presented to Mr. LaRossa outlines of what I believed the various prospective witnesses would give as testimony and what I thought various individuals knew about the case.

6. I made Mr. LaRossa aware that I never profited from the Dominguez transactions, and that Hemlock, Berman, and Frank controlled the time deposit accounts of the Columbia and Splindian Corporations in which the proceeds of the land deals were held.

7. And I told Mr. LaRossa that since I was an innocent participant, that I wanted to testify about the case. I asked him to prepare me to testify on a number of occasions.

8. While he told me that we would engage in preparation for testimony, no real trial preparation for my testimony ever occurred.

During the Trial

9. During the trial, I continued to ask Mr. LaRossa to start preparing me to testify, although during those proceedings I was in a condition best described as numb. All I had wanted to do was to present a defense by offering the truth as I knew it to be; both I and my wife asked Mr. LaRossa more than once to put me on the witness stand.

10. Mr. LaRossa told me that I would not make a good witness, that he thought I was too nervous and made a poor physical appearance. He made a special note that my hair was particularly disheveled. He told me that I would have to rely upon his knowledge and experience, and insisted that I not testify. Relying on his strongly stated opinion, I did not testify at trial.

No Defense was Presented At All

11. No defense case went in for me at all. I had informed my lawyer about the various witnesses available to testify. I told him about Kenneth Becker, Esq., another name partner in the Hemlock firm, who would have testified that Hemlock had told him the same thing that he told me about the Dominguez transaction - that the unusual legal services he had performed for Mrs. Dominguez were the cause for the land deals, the proceeds of which were to be fees paid for those legal services. I mentioned during the trial that Sidney Blumenberg, an accountant, could have contradicted Mrs. Dominguez on one aspect of her testimony, in which she testified that Blumenberg and I were present at a meeting called to discuss Canadian land deals; her testimony was innacurate, and Blumenberg would have testified that he was never present at any such meeting. Both Blumenberg and Becker testified at Bar Association disciplinary proceedings several months later. I respectfully request that the Court review their testimony in ruling upon this motion.

The Berman and Frank Affidavits

12. I was convicted and was sentenced to a jail term. I was incarcerated in Allenwood Prison Camp, Allenwood, Pennsylvania, where I

again met John Frank and Steven Berman, co-defendants in the case. While I was reluctant even to speak with them at first, eventually we began to speak a little and they finally told me about the information now contained in their affidavits. I was astounded by the revelation and asked them to give me affidavits. They finally executed affidavits in the middle of 1976, turning them over to me just before I left Allenwood in June of this year.

I Believe that Mr. LaRossa was Not Representing my Inter[illegible].

13. Based upon the information contained in the Berman-Frank affidavits, and upon a review of the entire case, I must conclude that Mr. LaRossa was not represnnting my interests at the trial of this action. In addition to the evidence that could have been presented on my behalf - information which led the Bar Association Referee to conclude that I had overcome the presumption of guilt at disciplinary proceedings - I believe that cross-examination of the various witnesses by Mr. LaRossa reflects the basic conflict of interest that existed throughout the case. First, he did not question Mr. Latvis and Mrs. Reilly, the First National City Bank

officials, who testified innacurately that I had access to and participated in breaking the time deposit accounts of Columbia and Splindian Corporations with Hemlock and Frank. His examination of other witnesses demonstrates, in my opinion, his interest in helping Alfred Hemlock in his defense.

14. My position, therefore, is not that I received ineffective assistance of counsel but that - in substance - I was not represented at all. The evidence contained in the Berman and Frank affidavits leads me to conclude that Mr. LaRossa was representing everyone but me in the case, a state of affairs that constitutes a clear violation of my Sixth Amendment right to counsel.

I Never Practiced Criminal Law

15. Never having done criminal work in my life, I had no familiarity at all with criminal procedure, with criminal trial practice, with the kinds of judgments criminal lawyers make during the trial of criminal cases. Accordingly, I was placed in the hands of an attorney who is widely regarded as an expert in his field and as an excellent defense attorney. Therefore, it never occurred to me to discharge him, or to question his judgment upon the record of the trial, when he insisted that I not testify in my own defense. I relied upon his

judgment.

16. Furthermore, his statement to me that the government case was weak and that a jury would not convict me on the basis of the government's case served to override my own judgment that I had to take the witness stand in order to tell the truth and to prevail.

The Bar Association Report

17. After my conviction in Federal Court, I had a hearing before a referee appointed by the Appellate Division, Supreme Court of the State of New York, First Department, in disciplinary proceedings. The case that should have been presented for me during the trial was presented there, with the result that I was exonerated from professional blame by the referee, George Trosk, Esq., in the Dominguez case. A copy of the Trosk report is annexed hereto. The hearing minutes are available for the Court.

Documentary Proof about the Time Deposits

18. During the trial, Hemlock had obtained an injunction against release of bank records relating to the deposit accounts of the Columbia and Splindian Corporations. The government was unable to

procure those records, even though it attempted to do so. Those records demonstrate beyond question that I was not a signatory to the time deposit accounts, did not have access to them, and consequently I could not have - as Mr. Latvis and Mrs. Reilly testified - break them and remove money from them. If presented at the trial, I believe this evidence would have dramatically altered the jury result, exonerating me as it does from blame of having "carted away the loot" in the case. The Appellate Division, First Department, recognized that this evidence was not available at the trial. In the Matter of Harry Hoffer, supra. Annexed hereto is the communication of the First National City Bank showing that I had no access to those time deposit accounts.

19. The Bank appeared at the disciplinary proceedings through its attorney, Messrs. Shearman and Sterling, in the person of an associate of that firm, Matthew Gruskin, Esq. Mr. Gruskin recounted that the bank had received subpoena for the information about the bank accounts, was not responding to that subpoena, but voluntarily responded to a request for the information made by me.

WHEREFORE, based upon the foregoing, upon the entire records of the case, upon the exhibits annexed hereto, upon all the affidavits herein, and upon counsel's annexed memorandum of law, it is respectfully requested that this motion pursuant to Rule 33 be granted upon grounds of newly discovered evidence and in the interest of justice, and that the Court grant whatever other and further relief which to this Court may seem just and proper.

Respectfully submitted,

Dated: New York, N.Y.
October 12, 1976

HARRY HOFFER,
Defendant-Petitioner

Sworn to before me this
12th day of October, 1976.

RALPH S. NADEL
Notary Public, State of
Commission Expires

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA
vs.
HARRY HOFFER

John J. Frank, being duly sworn, deposes and says:

I was a co-defendant of Alfred J. Hemlock, Harry Hoffer and Stephen Berman.

At or about the time of our indictment in the U.S. District Court for the Southern District of New York, in December 1952, Hemlock told me that he was going to obtain an attorney for Hoffer, so that he, Hemlock, could be able to control Hoffer. That unless this was done, Hoffer would go to the U.S. Attorney's office and obtain immunity and become a Government witness. That later an attorney was obtained for Hoffer by Hemlock and Hemlock said that he had control of Hoffer through this lawyer because Hemlock was paying the lawyer. That from the time of indictment to time of trial, Hemlock told me on two or three different occasions that Hoffer's wife was advising him to go to the U.S. Attorney and tell the truth. That he, Hemlock, and the lawyer he had obtained for Hoffer had been able to dissuade Hoffer from following the advice of his wife. That during the trial Hemlock told me that Hoffer wanted to take the stand in his own defense. That Hoffer's testimony would be damaging to the other co-defendants. That Hoffer did, during this period of time tell me he wanted to testify in his own behalf and defense because he felt that he had nothing to hide. That Hemlock told me that Hoffer's lawyer, at Hemlock's insistance, prevailed upon him not to take the stand in his own defense.

That I have seen a writing given to Hoffer by Berman. That prior to the giving of this writing Berman told me that he was going to give Hoffer such a writing and told me what was to be contained in said writing. He told me all of the facts and circumstances and told me that said writing was true. He told me that Hemlock had said such to Hoffer's attorney. He told me that Hoffer's attorney had said that Hoffer wanted to testify and would tell the truth about the case as he saw it. That Hoffer's attorney, Hemlock and Berman decided that the case would be rested without any defense. That Hoffer's attorney would convince Hoffer that the Government case was very weak and no defense was needed. Hoffer's attorney told Hemlock and Berman that if Hoffer testified he would greatly hurt his co-defendents who would all be convicted with the possible exception of Hoffer.

John J. Frank

Sworn to before me this
2 day of JUNE, 19[illegible]

[illegible]
Officer - Authorized by
July 7, 1955 to admin-
ister oaths (18 U.S.C. 4004).

BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITEDSTATES OF AMERICA
VS.
HARRY HOFFER

Stephen Berman, being duly sworn, deposes and says:

I am presently incarcerated at Allenwood Federal Prison Camp. I was a co-defendant of Alfred J. Hemlock and Harry Hoffer.

At or about the time of our indictment in December 1972, I met with Hemlock in his office at 15 Columbus Circle, New York. Present were John Mac Gillicuddy, Michael Direnzo, Hemlock and myself. We discussed obtaining an attorney for Harry Hoffer. Direnzo suggested James LaRossa. Direnzo and Hemlock clearly made the point that LaRossa could be controlled. LaRossa was retained and a fee of $15,000 was agreed upon, a few days later when he came to Hemlock's office. This fee was paid by Hemlock, periodically, in cash.

During our trial in June 1973, Hemlock, MacGillicuddy, Direnzo LaRossa and myself met at lunch in Gassner's Restaurant. At that time LaRossa told us that Hoffer was insisting on testifying and would tell the truth, as he saw it, about the case. It was then decided, with LaRossa's approval that we would rest our case and put in no defense. LaRossa said that he would convince Hoffer that the Government case was very weak and no defense need be introduced, LaRossa stated that if Hoffer testified we would all be convicted with the possible exception of Hoffer.

On many occasions prior to and after our trial, I sat in on sessions between Hemlock, Direnzo and LaRossa and the sole subject was keeping Hoffer in line and keeping him from cooperating with the Government.

Stephen Berman

Sworn to before me this
3 day of June, 1976

Notary Public

SHEARMAN & STERLING

53 WALL STREET

NEW YORK 10005

(212) 483-1000

CABLE NUMLATUS TELEX ITT 421285 WU 128103

HAND DELIVERY

January 13, 1975

Referee George Trosk
860 Fifth Avenue
New York, New York

Dear Referee Trosk:

In connection with proceedings involving Harry Hoffer, we enclose a cable dated January 10, 1975 from Messrs. Higgs & Johnson, attorneys for First National City Bank in Nassau, Bahamas, to the undersigned.

Very truly yours,

SHEARMAN & STERLING

Matthew C. Gruskin

aml
Enclosure
cc: Mr. Harry Hoffer
3323 Seawane Drive
Merrick, New York 11560

01/10/75 1734 [illegible]

[illegible] 481295

A

[illegible] 481295

THIS IS [illegible] CALLING SHANGHAI AND STERLING

1.I 481295 NEW YORK JANUARY 10,1975

FOR SHANGHAI RE DISCIPLINARY PROCEEDINGS AGAINST HARRY HOFFER AN ATTORNEY AT AND FIRST NATIONAL CITY BANK UNDER WHICH HAVE AND INTER DOCUMENTS ESTABLISHING AND GOVERNING OPERATION OF BANK ACCOUNTS OF COLUMBIA CORPORATION LIMITED AND SPLENDIAN INVESTMENTS LIMITED AND BASED ON THAT EXAMINATION WE ARE NOW TO ADVISE AS FOLLOWS ONE COLUMBIA CORPORATION MAINTAINED THREE TIME DEPOSIT ACCOUNTS BUT HARRY HOFFER WAS NOT AUTHORISED TO SIGN FOR THOSE ACCOUNTS NOR OTHERWISE TO DRAW ON THOSE ACCOUNTS AND SPLENDIAN INVESTMENTS LIMITED MAINTAINED TWO TIME DEPOSIT ACCOUNTS BUT HARRY HOFFER WAS NOT AUTHORISED TO SIGN FOR THE ACCOUNTS NOR OTHERWISE TO DRAW ON THOSE ACCOUNTS

ALSOP AND [illegible]

[illegible] 481295

A

[illegible] 481295

.....

AGREEMENT

AGREEMENT, made this 31st day of December, 1968, by and between ALFRED J. HEMLOCK, residing at 200 Central Park South, New York, New York, hereinafter called the party of the first part and/or Hemlock, IRVING LIST, residing at 100 Ocean Parkway, Brooklyn, New York, hereinafter called the party of the second part and/or List, HARRY HOFFER, residing at 3323 Seawane Drive, Merrick, New York, hereinafter called the party of the third part and/or Hoffer, and KENNETH B. BECKER, residing at 16 Woodglen Drive, New City, New York, hereinafter called the party of the fourth part and/or Becker;

WHEREAS, the parties of the second, third and fourth part are now associated with the party of the first part, in the office of the party of the first part, in the practice of law; and

WHEREAS, the parties of the first, second, third and fourth part are desirous of forming a partnership to engage in the general practice of the law;

N O W, in consideration of the mutual covenants and other good and valuable considerations, the parties hereto agree as follows:

1. The parties hereto shall, as partners, engage in the general practice of law, for a term of one (1) year and shall begin their partnership on January 1, 1969, and shall continue from January 1, 1969 until and including December 31, 1969, or thereafter until terminated as hereinafter provided.

2. The firm name of the said partnership shall be HEMLOCK, LIST, HOFFER & BECKER.

3. The offices of said partnership shall be at 250 Broadway, New York City, New York, and/or such other place as the party of the first part hereto may select.

4. All of the partners shall participate in the conduct

of the partnership affairs. Except as herein provided, the parties of the second, third and fourth part shall each devote their entire time exclusively to the business of the partnership, and said parties of the second, third and fourth part, shall not, directly or indirectly, engage in any other business or occupation without the written consent of the party of the first part. This shall, however, not prohibit the activity of the parties of the second, third and fourth part in investing or trading any stocks, bonds, commodities, securities, or other forms of investments for his own benefit. The party of the first part is hereby permitted to carry on or be engaged, for his own benefit, in any type of business whatsoever without accounting to the other parties for the conduct thereof or for any salaries, dividends or profits received therefrom. The party of the first part shall only devote such time to the partnership as the party of the first part deems in his opinion is sufficient.

5. No party to the partnership shall, without the consent of the other, make, draw, accept or endorse any bills of exchange, promissory notes for the payment of money or guarantee any debt on account or on behalf of the partnership, or pledge the credit of the partnership in any way, except in the course of a partnership business. No party to the partnership shall assign any part of his interest in the partnership, or enter into any agreement as a result of which any other persons shall become interested in the within partnership in the practice of law.

6. The party of the first part is the owner and tenant of the lease covering the suite at 250 Broadway, 25th floor, New York City, New York, and said lease shall remain the property of the party of the first part, and the partnership shall pay the rental provided in the said lease to the landlord and shall be entitled to collect all rentals from the sub-tenants or associates. All of the personal property now in the suite, consisting but not limited to the office furniture, files, desks, books, supplies, typewriters, and anything and everything contained therein, is the property of the party of the first part and

shall remain his property, except that the partnership shall have the use thereof, without charge, and except that the firm shall pay for any repairs and maintenance thereof, and the party of the first part shall be entitled personally to take the depreciation thereon. All securities deposited in the lease with the landlord of the building for the said suite located at 250 Broadway, New York City, New York, 25th floor, shall remain the property of the party of the first part.

7. The partnership books shall be maintained at the principal office of the partnership and each partner shall at all times have access thereto. The books shall be kept on a cash basis for the calendar year, and shall be closed and balanced at the end of each year. An audit shall be made as of the closing date of each year.

8. All funds of the partnership shall be deposited in its name in such checking account or accounts as shall be designated by the partners.

9. All cases and files now pending shall become the property of the partnership as of January 1, 1969, with the exception of Berrios & Martinez vs. City of N.Y., et al., all files involving Leone or Dominguez, which shall be the exclusive property of the party of the first part, and any monies received on these cases shall be the property of the party of the first part. In the event the other cases pending, which are being transferred to the partnership are settled or disposed of, then and in that event, all disbursements advanced until December 31, 1968, shall be returned to the party of the first part. The net attorneys fees in all cases originated through List, Hoffer or Becker, prior to January 1, 1969, shall be divided, upon collection, 50% to the respective originator-referror and 50% to the partnership.

10. All escrow monies now in the escrow account in the name of ALFRED J. HEMLOCK in account number 00891632, with the First National City Bank, 250 Broadway, New York City, New York, shall be transferred to the partnership escrow account to be opened at the First National City Bank, 250 Broadway, New York City, New York, or any bank hereafter decided

upon by the partners.

11. Each partner shall have a weekly draw against his percentage interest in the partnership, as follows, which shall be charged as an expense of the partnership:

ALFRED J. HEMLOCK	1,191.66
IRVING LIST	325.00
HARRY HOFFER	325.00
KENNETH B. BECKER	325.00

12. All of the parties shall be entitled to a petty cash reimbursement for which they shall file vouchers and account therefor, and same shall be approved by the party of the first part.

13. The net profits of the partnership shall be divided as follows:

55% to the party of the first part

15% each to the parties of the second, third and fourth part.

In the event that the partnership shall sustain a net loss for the year, then List, Hoffer and Becker shall not be responsible for said loss.

Any net profits shall be divided annually or as soon as practicable.

14. The term "net profits" as herein stated, shall mean the gross fees from all sources, less applicable business expenses paid by the partnership, including the following expenses, which shall also be paid by the partnership, as ordinary and necessary expenses in the operation of the business of the partnership:

1) 25% rent of apartment of AJH.

2) Theatre tickets AJH.

3) House Accts. Bway Joe - McCarthys - Patsy's Restaurant - Chateau Madrid.

4) Call-A-Ride, Ltd.

5) Garages (2) for Alfred J. Hemlock.

6) Donations.

7) Flowers.

8) Safe Deposit Box.

9) Cigars.

10) Car Rental.

11) Gas and Oil and auto repairs.

12) & other entertainment expenses.

15. All of the business accounts receivable of ALFRED J. HEMLOCK, resulting from the practice of the law, as of December 31, 1968, shall become assets of the partnership. (Business accounts defined to mean legal fees outstanding excepting paragraph #9).

16. (a) Upon the death of List, Hoffer or Becker, the surviving partners shall buy, and the executor or administrator (hereinafter called the "legal representative") of the deceased partner, shall sell to each surviving partner, that portion of the interest of the deceased partner in the partnership represented by the ratio of the interest owned by such survivor to the aggregate interests owned by all the survivors, for the total price of $25,000.00 and upon the terms and conditions hereinafter stipulated.

(b) In order to assure that all of the purchase price for the interest of the deceased partner first to die shall be available immediately in cash upon his death, the partners will immediately procure life insurance upon the lives of List, Hoffer and Becker in the amounts of $25,000.00 each, with the partnership as beneficiary. The partnership shall pay the premiums for said policies.

(c) Upon the death of a partner and the receipt of the $25,000.00 as aforementioned, and the payment of same to the representative of the deceased partner's estate, the deceased partner's interest in the partnership shall cease, except that the representative of the deceased partner shall receive the deceased partner's weekly draw for five (5) weeks after the decease, and shall also receive 50% of the net attorneys fee on all cases

referred to the partnership by the deceased partner as and which said fees are received by the partnership.

17. (a) Upon the death of Hemlock, the surviving partners shall buy and the executor or administrator (hereinafter called the "legal representative") of Hemlock shall sell to each surviving partner, that portion of the interest of the deceased partner in the partnership represented by the ratio of the interest owned by such survivor to the aggregate interests owned by all the survivors, upon the terms and conditions hereinafter stipulated.

(b) Payment shall be made to the representative of the proceeds of $25,000.life insurance policy on the life of Hemlock, which will be immediately obtained, and of which the partnership will be the beneficiary and will pay the premiums, and thereafter, 40% of the net profits of the partnership shall be paid to Hemlock's representative for a period of three years following the death of Hemlock and after three (3) years 30% for an additional three (3) years whereupon and thereafter Hemlock's representative will no longer share in the net profits of the partnership. Hemlock's estate shall have no further interest in the partnership except for the fair value of the assets of the partnership, or the assets which the partnership is using as is mentioned in paragraph 6 herein.

18. Upon withdrawal of any of the partners, the name of the withdrawing partner shall cease to be used by the partnership, and in the event of dissolution, each partners name shall belong solely to him.

19. Intentional retirement shall be permitted at the age of 65, and shall require ninety (90) days written notice by the retiring partner to each of the partners.

Upon retirement, the retired partner shall be entitled to and will receive from the partnership, each and every week, for a period of 5 years, the sum of $100 per week. In addition, he shall be entitled to 50% of the net attorneys fee on all cases referred to the partnership by him as and when said fees are received by the partnership.

In addition thereto, the partnership will continue to pay and be obligated to pay the premiums on the life insurance policy as hereinabove mentioned. However, said life insurance policy shall be turned over to the retiring partner who shall have the right to change the beneficiary.

20. The partnership shall be liable and shall pay the amounts set forth hereunder in the event of the sickness or illness of any of the parties.

In the event that List, Hoffer or Becker is disabled or ill, the partnership shall pay as stated hereunder for a period of 6 months at the full weekly draw, including the percentage of net profit as herein stated. Thereafter, if said illness or disability continues, no percentages of profits shall be paid, and one-half of the weekly draw as herein stated shall be paid to the partner sick or disabled until, including all amounts paid as stated in this paragraph, the total sum of $15,000.00 is reached and paid by the partnership to the sick or disabled partner.

At the time that said $15,000.00 is paid, the sick or disabled partner shall have been considered to have withdrawn from the partnership and shall not be entitled to receive any further benefits from the partnership, except that he shall be entitled to receive 50% of the net attorneys fee on all cases referred to the partnership by him as and when said fees are received by the partnership. In addition, the partnership shall continue to pay the life insurance policy as herein mentioned, and the sick or disabled partner shall have the option and right to change the beneficiary of said policy.

In the event Hemlock is sick or disabled, the partnership shall pay as stated hereunder for a period of one year at the full weekly draw, including the percentage of net profits as herein stated. Thereafter, if said illness or disability continues no percentage of profits shall be paid, and one-half of the weekly draw as herein stated shall be paid to Hemlock for a period of four (4) years.

22. Any partner may withdraw from the partnership on ninety (90) days written notice. All assets belonging to that partner, including all cases from clients of that partner or referred by clients of that partner, shall belong to that partner. Upon withdrawal or dissolution, all cases not listed in a file captioned "Originating Cases" and initialed by all partners shall be deemed to be the clients of and originating with the party of the first part. The cases of the parties of the second, third and fourth part shall be added to the list and initialed by all of the partners. In addition to the foregoing the withdrawing partners shall be entitled to his share of the undistributed net income to date of withdrawal.

23. On or before January 4th, 1969, the following capital contributions will be made and deposited in the regular bank account of the partnership:

ALFRED J. HEMLOCK -	$5,500.00
KENNETH B. BECKER -	$1,500.00
IRVING LIST -	$1,500.00
HARRY HOFFER -	$1,500.00

23. It is expressly understood and agreed that as one of the conditions of this agreement, LIST, HOFFER & BECKER must segregate a portion of their residence and maintain said portion of their residence as an office for the practice of law in the County in which they reside without compensation from the partnership.

It is further expressly understood that LIST, HOFFER & BECKER shall only be reimbursed from the partnership for automobile and entertainment expenses directly applicable to specific clients of the partnership and approved by HEMLOCK. LIST, HOFFER & BECKER shall individually be responsible for automobile and entertainment expenses for other clients, entertainment at home or otherwise and shall not be so reimbursed.

It is not intended that the reimbursement shall encompass their entire business automobile or business entertainment expense but the incurring of same are encompassed in their share of partnership profits.

IN WITNESS WHEREOF, the parties have set their hands and seals this 31 day of December, 1968.

/s/ Alfred J. Hemlock
ALFRED J. HEMLOCK

/s/ Irving List
IRVING LIST

/s/ Harry Hoffer
HARRY HOFFER

/s/ Kenneth B. Becker
KENNETH B. BECKER

RIDER TO AGREEMENT OF
DECEMBER 31, 1968.

AMENDMENT TO PARAGRAPH 14:

In the event any of the foregoing expenses are disallowed for tax purposes, HEMLOCK shall be responsible for any additional tax liability resulting therefrom.

/s/ Alfred J. Hemlock

/s/ Irving List

/s/ Harry Hoffer

/s/ Kenneth B. Becker

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA,

72 Cr. 1365 (M.P.)

- against -

MEMORANDUM OF LAW

HARRY HOFFER,

Defendant-Petitioner

----------X

INTRODUCTION

In June, 1973, Harry Hoffer was unjustly convicted of a conspiracy to defraud Maria Trujillo Dominguez, the daughter of the late dictator of the Dominican Republic, by involvement in a land fraud based upon the purchase of Canadian land at a price ten times its actual value. Mr. Hoffer received a jail sentence, was suspended from the practice of law, and suffered immeasurable personal hurt and injury by virtue of this unjust conviction.

Subsequent to the trial, Mr. Hoffer discovered evidence, which had it been presented at the trial, would have resulted in an acquittal. Accordingly, he presents these

issues herein, in the annexed motion for a new trial brought pursuant to Rule 33, Federal Rules of Criminal Procedure, requesting that he be granted a new trial because of newly discovered evidence and in the interest of justice.

There are two grounds for the motion. First, the defendant at trial was denied the effective assistance of counsel, within the meaning of the Sixth Amendment of the United States Constitution, for reasons made clear in the affidavits of Mr. Hoffer, John Frank, and Steven Berman, all co-defendants at the trial, and submitted with the motion.

Secondly, newly discovered documentary evidence came to light after the trial that by itself would have altered the trial result. This document proves that the most damaging evidence against Hoffer was simply not true; that the testimony given by employees of the First National City Bank, Nassau Branch - Mr. Latvis and Mrs. Reilly - testimony to the effect that Hoffer had access to time deposit accounts of Columbia and Splindian Corporations used to contain the illicit proceeds of the swindle and actually broke those deposits and withdrew the criminal proceeds from the bank - was patently false, inaccurate, and untruthful. The documentary evidence proves that Hoffer had no such access and

consequently, did not and could not have withdrawn funds from those accounts.

Mr. Hoffer's affidavit sets forth the manner of the discovery of this crucial information. Without the Latvis-Reilly testimony, the Government could not have argued in any fashion or in any forum that Hoffer "carted away the loot", or shared in the proceeds of the criminal event, an idea the Government itself later realized was mistaken. This testimony furnished the principal basis upon which it was said that Hoffer had criminal knowledge and participation.

Either of the grounds presented in this motion should entitle Hoffer to a new trial. He was the victim in this case of a grave injustice, having lost his professional standing, the right to practice law, his freedom, and his dignity. This Court is presented with a rare opportunity to correct a grievous error in the administration of justice.

TIMELINESS OF MOTION

This motion is timely brought, within the meaning of Rule 33, which provides that a motion for a new trial based

upon newly discovered evidence

> "may be made only before or within two years after final judgment...".

Final judgment means the termination date of any appellate proceedings. The date of termination of appellate process in this case was October 15, 1974, i. e., the date upon which the Supreme Court of the United States denied certiorari to Mr. Hoffer's cause. Hoffer v. United States, 419 U. S. 828 (1974); see also, United States v. Frank, 494 F. 2d. 145 (2d. Cir., 1973).

The rule is well stated in Smith v. United States, 283 F. 2d. 607 (D. C. Cir., 1960), cert. denied 364 U. S. 938, 370 U. S. 950 (1962), which held that "two years" in Rule 33 means

> "two years after the conviction ceases to be subject to direct attack; i. e., the date of final judgment is the last date for taking an appeal, if no appeal is taken; and (2) if appeal is taken, the date when the appellate process is terminated....".

See also Harrison v. United States, 191 F. 2d. 874 (5th Cir., 1951); Casias v. United States, 337 F. 2d. 354 (10th Cir., 1964); Williams v. United States, 310 F. 2d. 317 (6th Cir., 1962); and Douglas v. United States, 240 F. Supp.

381 (1965), per Weinfeld, J., citing Smith and Harrison with approval.

Clearly, then, this motion has been filed "within two years after final judgment" and this Court may take cognizance of the issues raised.

RULE 33 IS THE PROPER FASHION IN WHICH TO PROCEED

Mr. Hoffer has proceeded properly in this matter. First, with regard to the newly discovered documentary evidence about the time deposit accounts, th[illegible] matter is clearly within the ambit of Rule 33 without further explanation. It was not available at trial for a number of reasons. First, Mr. Hemlock, the co-defendant, had blocked access to those records in collateral proceedings initiated by him in the Bahamas in order to prevent their introduction at trial;[1]

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[1] The Government had tried in vain to secure the presence at trial of the bank documents relating to the time deposit accounts of the Columbia and Splindian Corporations. Co-defendant Alfred Hemlock, in legal proceedings he initiated in the Bahamas, availed himself of the provisions of a Bank Secrecy Act in that country in order to secure a Court Order preventing the delivery of the documents. Hoffer, of course, was surprised by the Latvis-Reilly testimony; not having the access they said he had, he had no way of anticipating that this testimony would come in against him.

second, Mr. Hoffer, not having been a signatory to those accounts and not having had access to them, was surprised by the introduction of testimony that - as to him - was blatantly inaccurate at best and false at worst. No amount of diligence could have secured those documents to contradict Latvis' and Reilly's testimony.

With regard to the issue about counsel, a defendant may raise the issue of ineffective assistance of counsel under Rule 33 and support that claim with evidence dehors the record either on timely motion for new trial or on collateral attack.[2] United States v. Brown, 476 F. 2d. 931 (D. C. Cir., 1973). It is well settled that where there was not at the trial the reasonably competent assistance of an attorney acting as [the defendant's] diligent advocate, a defendant is entitled to a new trial. United States v. Lucas, 513 F. 2d. 509 (D. C. Cir., 1975).

A claim of denial of Sixth Amendment rights should be presented to the District Court in a motion for a new trial and evidence dehors the record may be presented in

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[2] The most likely form of collateral attack, of course, being a motion brought under the provisions of 21. U.S.C. §2255, a remedy available primarily to sentenced prisoners, a status Mr. Hoffer still maintains.

affidavit form; when necessary, the Court may order a hearing and render a decision that may be appealed. United States v. DeCoster, 487 F. 2d. 1197 (D. C. Cir., 1973).

Both claims, then, that relating to later discovered documentary proof that Hoffer had no access to the time deposit accounts in the Bahamas and that relating to the representation he received by defense counsel, are cognizable under Rule 33.

STANDARDS TO BE APPLIED

While motions for new trials under Rule 33 are not generally favored,[3] they will lie where the proof meets four standards:

1. The evidence in question has been discovered since the trial;

2. The evidence is material, not cumulative;

3. The introduction of this evidence would probably cause a different result;

4. This evidence could not have been discovered with due diligence before the trial.

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[3] Generally, the Courts exact a high burden from those seeking new trials under Rule 33, absent a showing of government misconduct. United States v. Brown, supra. There is, of course, no allegation of misconduct by the government in this matter.

See United States v. Slutsky, 514 F. 2d. 1222 (2d. Cir., 1975); United States v. Dellacroce, 491 F. 2d. 268 (2d. Cir., 1974) Cert. denied; 419 U. S. 825 (1974); United States v. Kahn, 472 F. 2d. 272 (2d. Cir., 1973), cert. denied 411 U. S. 982 (1973); United States v. Marquez, 363 F. Supp. 802, aff'd. without opinion 489 F. 2d. 753 (2d. Cir., 1974), 490 F. 2d. 1383 (2d. Cir., 1974); cert. denied 419 U. S. 826 (1974).

Mr. Hoffer, upon either ground raised in the motion, meets every element of the burden of proof laid upon him.

THE EVIDENCE WAS DISCOVERED SINCE THE TRIAL.

Both aspects of this motion are based upon evidence discovered after the trial. The evidence about the time deposit accounts demonstrating that the defendant did not have access to the money contained in those accounts was not available until the defendant participated in a hearing ordered by the Appellate Division in disbarment proceedings. (See Hoffer affidavit.) It could not have been otherwise. The testimony of Latvis and Reilly, the bank officials, was a surprise to Mr. Hoffer. The documents in question, blocked for all purposes during the trial, were not available in any fashion to contradict that damaging testimony.

The first standard, then, is satisfied.

The allegation about counsel was not discovered until the year 1976; the affidavits of Frank and Berman were not made available to Mr. Hoffer until June of this year. Again, there is no way in which this evidence could have been discovered earlier. Mr. Hoffer's affidavit explains the circumstances of his having been made aware of the information contained in the affidavits of Frank and Berman.

The Appellate Division, First Department, of the Supreme Court of the State of New York, made a specific finding that the time deposit evidence was "documentary evidence not available at the time of the criminal trial.... ..which showed that Hoffer had no access to the funds of the Columbia or Splindian Corporations." In the matter of Harry Hoffer, New York Law Journal, May 26, 1976.

THE EVIDENCE IS MATERIAL, NOT CUMULATIVE.

Both aspects of this evidence are material in nature, not cumulative. The documentary proof about the time deposits would have absolutely discredited the testimony of Latvis and Reilly about Hoffer's alleged access to the

time deposit accounts and their statement that he broke the time deposits and withdrew money.

Their testimony was of central importance because it furnished the government testimony from which it could argue that the defendant profitted from criminal activity instead of being, as he has always contended, an innocent person acting as an attorney in lawyer's functions, under the control, direction, and supervision of his employer, Alfred Hemlock. Without the proof of the time deposits, the Government could not have persuaded the jury that any of the defendant's actions were anything but innocent; there would have been no evidence whatsoever of guilty knowledge and guilty action.

The Latvis-Reilly false testimony enabled the Government to argue in summation that Hoffer and others broke open the time deposits and carried away money; it enabled our Court of Appeals to conclude that

> "Perhaps the most damaging evidence against them (Hemlock and Hoffer) was their personal participation with Frank in the breaking of the time deposit just after Frank learned that the jig might be beginning to be up...." United States v. Frank, supra, at p. 153.

And the Latvis-Reilly testimony enabled the Government to argue, in convincing fashion, that Hoffer broke the time deposits and took money from the bank, in the following fashion:

> "The purchase monies were largely funneled back to Hemlock, Hoffer, and Frank, who carried away some $600,000 in cash from a Bahamian Bank account...." United States of America, Brief on Appeal, at p. 3.
>
> Hemlock, Hoffer, and Frank break the time deposits and leave the Nassau Branch with a large sum of cash. At p. 16.
>
> Hoffer's signature was necessary to deposit and withdraw the funds from the two Bahamian time deposit accounts and he participated in carting off the loot. Id. at p. 25."

How much more material a piece of evidence could be is hard to imagine. The bank documents absolutely refute the Latvis-Reilly testimony and would have foreclosed that crucial aspect of the government's argument about Hoffer.

THE EVIDENCE ABOUT COUNSEL'S INFIDELITY IS SIMILARLY MATERIAL.

There is no more material factor in the trial of cases and the evaluation of testimony than the manner in which counsel represents a client. Absent counsel's action

based upon the motive described in the Frank and Berman affidavits, the following evidence would have been introduced for Mr. Hoffer:

1. testimony from Kenneth Becker, Esq., would have established that Hoffer acted as an employee of Hemlock, not as a partner;

2. testimony from Sidney Blumenberg, an accountant, would have refuted Mrs. Dominguez's recollection that he and Hoffer were present at a meeting where she brought up the question of Canadian real estate with Hemlock;

3. testimony from Hoffer would have exculpated himself, and the Court of Appeals would not have been able to conclude that "when a defendant has offered no case,

> it may be reasonable for a jury to draw inferences from the prosecution's evidence which would be impermissible if the defendant had supplied a credible exculpatory version." United States v. Frank, supra, at p. 153.

In light of the Frank-Berman affidavits, then, the admonition of the Court of Appeals that the defendant was bound by the "strategy" of not testifying no longer holds. United States v. Frank, id. at 153, fn. 11. The evidence now presented, rather, supports Hoffer's present belief that the decision not to call him was not a strategic decision at all.

Thus, the case that Hoffer would have put into evidence was material in every regard. It is material from the point of view of what juries tend to believe about accused persons, expecially lawyers, and it is material from the point of view of our own Court of Appeals.

THE EVIDENCE, IF PRODUCED AT TRIAL, WOULD HAVE CAUSED A DIFFERENT RESULT.

This point is not speculative. It is not based upon belief, forecast, evaluation, optimism - whether true or false - or the polyannish presentation of a hopeful litigant. This point is based upon empirical evidence of the highest value: Hoffer has already been exonerated in hearings ordered by the Appellate Division, First Department, Supreme Court of the State of New York, in disbarment proceedings.

There were significant differences between the disbarment proceedings and the trial. First, Hoffer put in a case. He testified. And others testified as well, who should have testified at trial.

Second, the document showing that the Latvis-Reilly

testimony was false had been put into evidence, and proved that Hoffer had not had access to the time deposit accounts and could not have "carted away the loot" by any stretch of either imagination or faulty recollection.

Third, where Hoffer was presumed innocent in his criminal trial, he was presumed guilty at the disbarment proceedings; but in that proceeding, he overcame the presumption of guilt by presenting the case he was unable to present at the trial.

Thus, the referee who presided at the disbarment hearing made the following findings:

1. "There is no evidence that anything Hoffer said or did was, per se, fraudulent or unprofessional. Hoffer did not participate in the conception or the formulation of the fraudulent plan, and he made no false or deceitful statement to anyone about it; he had no financial interest in Columbia or Splindian, and he did not profit, or ever expect to profit, from the plan....Report and opinion of Referee George Trosk, in In the Matter of Harry Hoffer, Appellate Division, First Department, the disbarment proceedings held after Hoffer's conviction, at pps. 78-9.

2. Further findings were that Hoffer is and was

"a straightforward, honest, truthful, even naive, person, without guile or cunning or evil, and second: that he had held Hemlock in such respect and awe during the period here involved that suspicion of him never entered Hoffer's mind.

In my opinion, by the testimony in these hearings, none of which was before the criminal court, the respondent Hoffer has overcome the presumption of guilt created by his conviction in the Federal Court." Opinion and Report, Referee George Trosk, at p. 81.

There is no doubt that the trial result would have been different indeed had this newly discovered evidence been available.

DUE DILIGENCE

One seeking relief by way of Rule 33 must show that due diligence could not have secured introduction of the evidence in question. The document, of course, was simply unavailable, the Government having tried in vain to secure its possession. That Hemlock was able to block,

through ancillary legal proceedings in the Bahamas, the acquisition by the Government of the documents relating to the Columbia and Splindian bank accounts, is additional proof of the inherent and total conflict of interest between him and Hoffer.

The information about Mr. LaRossa was not available until the year 1976, nor could it have been available earlier.

The due diligence requirement has been satisfied and should not impede granting of the requested relief.

CONCLUSION

Mr. Hoffer has satisfied all the legal requirements for a new trial to be granted. In this unusual motion, he has demonstrated upon the affidavits submitted that he was deprived of centrally important documentary evidence - the time deposit tickets of the Columbia and Splindian Corporations; that he was convicted based upon false and inaccurate testimony given by Latvis and Reilly; that he was denied an opportunity to defend himself by testifying in his own behalf or by presenting the very powerful and very convincing defense case that was available to him.

That Mr. Hoffer - trusting to the ancient axiom of our calling that a man who defends himself has a fool for a client - relied upon the expressed judgments and opinions of counsel, under the circumstances indicated in the evidence, should not foreclose him from relief. Rather, the Court here can assure that, in this case at least, the interests of this severely injured man can achieve a measure of redress.

WHEREFORE, it is respectfully requested that the within motion for a new trial pursuant to Rule 33 be granted, either under the provision of newly discovered evidence or simply in the interest of justice. It is respectfully urged that this conviction should not stand.

Dated: New York, N.Y.
October 11, 1976

RESPECTFULLY SUBMITTED,

RALPH S. NADEN
Attorney for Harry Hoffer
253 Broadway
New York, N.Y. 10007
(212) 964-1998

WCMACD:dlf

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA, :

- v - : AFFIDAVIT

HARRY HOFFER, : 72 Cr. 1365 (MP)

Defendant. :

- -x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

W. CULLEN MACDONALD, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the offices of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, and, as such, am familiar with the above-captioned matter.

2. This affidavit is submitted in opposition to the defendant Hoffer's motion for a new trial under Rule 33. Hoffer was originally convicted in 1973 of a conspiracy to defraud Maria Trujillo Dominguez, the daughter of the late dictator of the Dominican Republic. The scheme involved a fraud based upon a purchase of Canadian land at ten times its actual value. Hoffer and his co-defendants Hemlock, Frank and Berman were tried in the United States District Court for the Southern District of New York, the Honorable Milton Pollack presiding, and a jury, in June, 1973, and were all found guilty. Hoffer

was convicted of conspiracy, two counts of mail fraud, and four counts of transporting in foreign commerce securities fraudulently obtained. Hoffer's conviction was upheld by the Court of Appeals (United States v. Frank, 494 F.2d 145 (2d Cir. 1974)) and review in the Supreme Court was denied on October 14, 1974, (Hoffer v. United States, 419 U.S. 828 (1974)).

3. Attached hereto as Exhibit A to this affidavit, is the testimony given on November 12, 1974, before Referee Trosk of James LaRossa, Hoffer's trial counsel, with regard to his advice to Hoffer as to the presentation of any defense case. Essentially, it was based on his bona fide judgment that the Government's case case was weak enough to warrant an across the board deliberate decision to forego defense cases. Far from being ineffective representation, this choice of strategy was made by an able and conscientious lawyer and is simply binding on Hoffer who, as a lawyer himself, understood both the rationale and the finality of that decision.

4. Attached hereto as Exhibit B are material excerpts from the balance of the record before Referee Trosk. In sum it establishes that Hoffer controlled access to the Bahamian bank evidence and had he taken the same affirmative steps in his criminal trial as in his disbarment proceedings, FNCB would have responded in the same fashion.

ACD:dlf

Additionally, he and Hemlock both admit that they each knowingly waived their rights to present other defense evidence including their own testimony at a joint conference with all of the defense attorneys. Finally, it is now apparent, for the first time, that Hoffer's testimony would not have been exculpatory since he admits playing a pivotal role in the fraud scheme.

WHEREFORE, it is respectfully requested that the motion for a new trial be denied in all respects and that the conviction stand.

W. CULLEN MACDONALD
Assistant United States Attorney

Sworn to before me this

day of November, 1976

NOTARY PUBLIC

CMacD:dl

(69)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA, :

- v - : 72 Cr. 136 (MP)

HARRY HOFFER, :

Defendant. :

- - - - - - - - - - - - - - - - - - - x

GOVERNMENT'S MEMORANDUM IN OPPOSITION TO HOFFER'S NEW TRIAL MOTION

The Government submits this memorandum in opposition to HOFFER's new trial motion under Rule 33, Fed. Rules of Crim. Proc., and in support of its positions that (1) no newly discovered evidence has been submitted and (2) no rights have been shown to have been transgressed.

Preliminary Statement

In June, 1973, Hoffer was convicted of conspiracy in connection with a scheme to defraud Maria Trujillo Dominguez, daughter of the late dictator of the Dominican Republic, through the purchase of Canadian land at a price ten times its actual value. In addition to the conspiracy count, the jury found him guilty of transporting in foreign commerce securities fraudulently obtained, using a fictitious name, and two counts of mail fraud. His conviction was affirmed on appeal. (United States v. Frank, 494 F.2d 145 (2d Cir., 1974)) Hoffer received a jail sentence which he has completed serving since being placed on parole last June.

Hoffer now contends that he should be granted a new trial pursuant to Rule 33, Federal Rules of Criminal Procedure, because of newly discovered evidence and in the interest of justice.

POINT I

PETITIONER WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL

Hoffer claims that he was denied effective assistance of counsel, within the meaning of the Sixth Amendment, because his trial counsel was paid by Hemlock,

and in addition, because of an alleged discussion in which his co-defendant solicited that counsel to/advise Hoffer not to testify. Assuming arguendo that both allegations are true, Hoffer is still not entitled to any relief.

Leaving to one side, LaRossa's testimony before Referee Trosk that his considered judgments were the product of his unencumbered bona fide belief as to the most effective means of representing Hoffer, it is clear that fee payment by another than the client does not constitute a per se conflict of interest situation. (ABA Disciplinary Rule DR 5-107 (A)); See also ABA Criminal Justice Project, Defense Standard §3.5(c). Similarly, the expressed views of others (counsel, co-defendants, witnesses, family, etc.) in and of themselves cannot be though to contaminate counsel's independent integrity, no matter how ill considered. Hoffer's allegation that LaRossa's loyalties were overridden must be considered against the rule in this Circuit

> "It is settled in this Circuit that 'some specific instance of prejudice, some real conflict, must be shown to exist before it can be said that an appellant has been denied the effective assistance of counsel.'" (United States v. Mari, 526 F.2d 117, 119 (2d Cir., 1975), quoting United States v. Lovano, 420 F.2d 769, 773 (2d Cir.), cert. denied, 397 U.S. 1071 (1970)).

See also United States v. Vowteras, 500 F.2d 1210, 1211 (2d Cir.), cert. denied, 419 U.S. 1069 (1974); United States v. Wisniewski, 478 F.2d 274, 281 (2d Cir. 1973); United States v. Alberti, 470 F.2d 878, 881 (2d Cir. 1972), cert. denied, 411 U.S. 919 (1973).

A case which more nearly parallels the present one is United States v. McCord, 509 F.2d 334 (D.C. Cir., 1974). In McCord, a convicted defendant in the Watergate case argued on appeal that his trial counsel's overriding loyalty to the White House had denied him effective assistance of counsel. Of the attorney's contacts with White House officials regarding such issues as financial support, clemency and "cooperation" the court said,

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> "At best they indicate only that McCord's attorney was consulting with the persons who arguably authorized the crime for which McCord was being tried and was [sic] allegedly involved in the same conspiracy that McCord himself was involved in, hardly evidence of a conflict of interest." (Id. at p. 352).

The court further rejected the Sixth Amendment claims by noting that McCord knew of his attorney's alleged "violations of confidence."

Hoffer admits that he knew about the financial arrangement between LaRossa and Hemlock (Hoffer Affidavit, p. 3 ¶3). He knew, therefore, that there was contact between the two regarding defense issues, contact analogous to that in McCord. Viewing this situation in light of the Mari requirement for specific showings of prejudice based on alleged conflicts of interest, and reemphasizing trial counsel's discretion concerning defense strategy, it is clear that Hoffer has not shown that he was denied effective assistance of counsel.

POINT II

PETITIONER HAS NOT MET THE STANDARDS FOR GRANTING A NEW TRIAL UNDER RULE 33

Similarly insubstantial is Hoffer's contention that he should be granted a new trial under Rule 33 because of newly discovered evidence.

Recently, the Supreme Court made it clear that before a Rule 33 motion is to be granted, the trial court must be persuaded that a reasonable doubt as to the defendant's guilt is created by the new evidence:

> "The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record." United States v. Agurs, 96 S.Ct. 2392 U.S. (1976)).

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Hoffer himself correctly notes that, absent a showing of Government misconduct (which he concedes is not alleged here), motions for new trials under Rule 33 are not readily granted.

The documentary evidence in question concerns Hoffer's alleged lack of access to the time deposit accounts which contained the funds obtained through the criminally fraudulent scheme. Such evidence by itself cannot meet the standard of "probably" causing a different result because Hoffer clearly controlled those funds as the sole authorized signator on the corporate accounts before transfer into the time deposits.

It is also worth noting that, although co-defendant Alfred Hemlock moved successfully under the Bank Secrecy Act to prevent delivery of the documents in question to the Government -- thereby foreclosing its use to convict -- the allegedly material evidence contained in the documents was within Hoffer's personal knowledge and control. Hoffer obviously knew whether or not he had access to the accounts. He could have

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testified in that regard, but he concurred in the judgment of counsel that his testimony would be unnecessary at best and detrimental at worst. This was another choice made by competent counsel which cannot be second-guessed.

II. CONCLUSION

Hoffer has not satisfied the stringent legal requirements for granting a new trial under Rule 33. He was effectively represented by an experienced attorney whose choices and tactics may not be cast aside. Further, the allegedly newly discovered evidence is not sufficiently material, and there is no showing that it probably would have led to a different result at trial.

WHEREFORE, it is respectfully requested that the motion for a new trial be denied and that the conviction stand.

Respectfully submitted,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States
of America

W. CULLEN MAC DONALD,
Assistant United States Attorney,
Of Counsel.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

-against-

HARRY HOFFER,

Defendant.

REPLY AFFIDAVIT

72 Cr. 1365 (M.P.)

----------X

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:
SOUTHERN DISTRICT OF NEW YORK)

RALPH S. NADEN, being duly sworn, deposes and says upon information and belief:

1. I am the attorney for Harry Hoffer, the petitioner in the within motion for a new trial pursuant to Rule 33, Federal Rules of Criminal Procedure.

2. This affidavit is submitted in reply to that furnished by the Government upon Mr. Hoffer's motion for a new trial, in order to clarify points at issue.

THE POINT ABOUT DEFENSE COUNSEL

3. The government's affidavit in paragraph 3 and at pps. 2-5 of its memorandum of law simply fail to address the issue raised in the affidavits executed by Mr. Frank and Mr. Berman, and submitted in support of the motion. Those affidavits do allege evidentiary facts

underlying the claim of "specific instance of prejudice, some real conflict" as required in United States v. Mari, 526 F. 2d. 117 (2d. Cir., 1975), cert. denied 397 U.S. 1071 (1970). At the very least, Mr. Hoffer would be entitled to a hearing in order to determine the issue with regards to the actions of defense counsel.

THE DOCUMENTARY PROOF

4. The government's response with regards to the documentary proof similarly does not begin to answer the serious question raised by the petitioner in his motion. The question, reduced to simplest terms, is the extent to which a conviction should rest upon false and inaccurate testimony.

The Latvis-Reilly testimony furnished two important elements of the crimes charged against Mr. Hoffer - that of guilty knowledge, or scienter, and that of motive and profit. Without the shaky underpinning of false testimony, there would have been absolutely no evidence in the record of the trial of either element, and reasonable doubt would clearly have existed as regards Mr. Hoffer.

Thus, the government's position that Hoffer should have protected himself against the contingency of false testimony ascribes a burden to this defendant or any defendant that is not realistic; there is no way that Hoffer could have anticipated that the government would introduce oral testimony at variance with the truthful facts.

In avoiding facing the crucial issue raised by the innacuracy of the Latvis-Reilly testimony, the government states that Hoffer "could have testified in that regard" (Government's Memorandum of Law, at pps. 3-4). Thus, it attempts to confuse two issues that require separate analysis - that of Hoffer's failure to testify and the reasons for that ~~failure, and that~~ of the entirely separate issue of the falseness of the Latvis-Reilly testimony and the newly discovered evidence about it. Had Hoffer testified, the Government would have and could have engaged in the strongest attack on his credibility as a witness; counsel would have pointed out that Hoffer had every motive to lie and that Latvis and Reilly were entirely without motive to lie; Hoffer would have been described, at least, as an

interested witness - critically concerned with the outcome of the case as against him. And the jury would have received instructions by the Court on these issues of law and the manner in which to apply the standards enunciated by the Court.

The documents, though, stand upon a different footing than Hoffer's oral testimony. The documents have no interest, have no motive, and their credility is beyond attack. Thus, in placing the burden upon Hoffer to testify, the government has failed to address the issue of the now-existing newly discovered proof of the falseness and innacuracy of the Latvis-Reilly proof - the only proof adduced at the trial indicative of guilt.

The government's argument, then, is built upon matchsticks. Expecting any defendant to anticipate false testimony is to ascribe to human beings preternatural powers that no person should be expected to bear in any legal proceeding.

HOFFER DID NOT CONTROL ACCESS TO THE BANK EVIDENCE

5. The government's position that Hoffer controlled access to the Bahamian bank evidence (government's affidavit at page two) is simply not accurate. Hoffer was finally able to secure, after a stop-and-start effort requiring approximately five months, a statement that he did not have access to the time deposit accounts

of the Columbian and Splindian Corporations. Now, as then, he has no access to the complete range of bank documents. His offer of proof is restricted to the available information summarized in the statement submitted with the motion. He had no access to the time deposit accounts which were the focus of the government's proof at trial and furnished such rich material from which the government argued proof of guilt. Again, in avoiding facing the issue of its now-apparent failure of proof, the government is attempting to paint Mr. Hoffer into a corner of responsibility he does not, in fact, occupy.

THE ISSUE BEFORE THE COURT

6. Thus, in relation to the documentary evidence, the Court is called upon to determine whether the false testimony upon which Hoffer's conviction was based shall receive continued vitality. The petitioner agrees with the government that

> "The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt...

> It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. United States v. Agurs, 96 S. Ct., 2392, -- U.S. -- (1976), emphasis supplied.

Examination of the entire record here reveals a conviction based upon false and innacurate testimony, and a sad lack of other incriminating proof. The Lat vis-Reilly testimony, when omitted from the record, would leave behind a reasonable doubt so large, and an area of justice so compelling, that the Court, in justice and in fairness, could not be blinded to its mandate.

Dated: December 1, 1976
New York, N.Y. 10007

Respectfully Submitted,

Ralph S. Naden
Attorney for Harry Hoffer
253 Broadway
New York, N.Y. 10007

Sworn to before me
this first day of December, 1976.

[illegible] BURSTEIN
Notary Public, State of New York
No. 60-4514050
Qualified in New York County
Commission Expires March 30, [illegible]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

* *

UNITED STATES OF AMERICA : SUPPLEMENTARY AFFIDAVIT

-against- : 72 Cr. 1365 (M.P.)

HARRY HOFFER, :

Defendant. :

* *

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:
SOUTHERN DISTRICT OF NEW YORK)

HARRY HOFFER, being duly sworn, deposes and says:

1. I am the moving party in this motion for a new trial pursuant to Rule 33, Federal Rules of Criminal Procedure.

2. This affidavit is being submitted in response to issues raised in the answering affidavits and memorandum of law submitted by the Government in response to my motion papers.

I DID NOT CONTROL THE BANK DOCUMENTARY EVIDENCE

3. The Government's statement that I "controlled" the bank document evidence is not accurate. I did not control that material. The purpose of this affidavit is to furnish the Court more precise information about how those materials were presented

at disciplinary proceedings.

THE IMPORTANCE OF THE BANK DOCUMENTS

4. Because I did not have access to the time deposit accounts in which the moneys gained from Mrs. Dominguez were held and ultimately distributed, I believe, to Messrs. Hemlock, Frank, and Berman, materials relating to those accounts were of no significance to me whatsoever until the false, inaccurate testimony of Mr. Latvis and Miss Reilly went into evidence upon my trial. I did not anticipate in any fashion that I would be linked to the proceeds of the land scheme since I did not participate in any way in the sharing of the proceeds.

5. When I was notified to appear in the disciplinary proceedings, I wanted to demonstrate, if I could, that the bank records contradicted the government's evidence. I felt that my own testimony would be insufficient in view of my interest in the event, and wanted to support it in the only way possible - with any records supporting my position.

6. I believed, at the time I applied for those records, that the stay, secured by Alfred Hemlock in the Bahamas to prevent the Government from bringing the bank documents into evidence at the trial, had been vacated. Believing the stay to be vacated, I was under the impression that the First National City Bank

would honor a subpoena.

CHRONOLOGY OF EVENTS

7. I received notice about the disciplinary proceedings in approximately the middle of 1974. Trial and conviction had occurred in approximately June of 1973.

8. On or about October 24, 1974, John McGillicuddy, Esq., the attorney who represented me at disciplinary proceedings, served First National City Bank with a subpoena for bank records relating to the time deposit accounts. The Bank was re-served on or about October 1974.

9. I was informed by Matthew Gruskin, Esq., of Messrs. Shearman and Sterling, to write a letter as a former listed officer (Assistant Secretary) of the Columbian and Splindian Corporations requesting the information about my interest in and control over the time deposit accounts of those Corporations. I followed his advice, writing that letter immediately.

10. On November 12, 1974, Mr. Gruskin testified about the sequence of events. While the Bank was apparently unwilling to respond to subpoena because of the Bank Secrecy Act in the Bahamas, Mr. Gruskin agreed to furnish whatever the Bahamian branch of the Bank was willing to give. He had no records when he testified.

11. No records of the time deposit accounts were available to Referee Trosk at the closing of testimony in November, 1974. A stipulation was entered into the record that such information as was made available by the Bahamian Branch of the First National City Bank could go directly to the Referee.

12. I am informed that the telegram submitted with the within motion finally arrived on January 12, 1975, two months after the closing of testimony before the Referee. It came after I made numerous requests by telephone to Mr. Gruskin to expedite the material.

THE BANK TELEGRAM AND THE TIME DEPOSITS

13. The Bank telegram came in response to the letter I wrote at Mr. Gruskins's suggestion, and answered the question raised by me asking for information about my interest in the time deposit accounts.

14. Thus, I had no control over those bank documents and records of the Columbian and Splindian Corporation time deposit accounts in the Bahamian Branch of the First National City Bank.

15. At this time, my understanding is that the Bank would not have honored my October, 1974 subpoena for bank records. I believe that their position was that Bank Secrecy in that jurisdiction prohibited them from making all the bank records available. The information ultimately furnished, as I understand it, was a voluntary act, not done in compliance with the subpoena issued by the Court, done at my request and on the basis of the letter I wrote requesting information about my interest in and control of the time deposit accounts.

Dated: December 6, 1976
New York, N.Y.

HARRY HOFFER

Sworn to before me this
6th day of December, 1976.

RALPH S. NADEN

WCMacD:dl

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
- - - - - - - - - - - - - - - - - - x

UNITED STATES OF AMERICA, :

- v - : SUPPLEMENTAL AFFIDAVIT
72 Cr. 1365 (MP)

HARRY HOFFER, :

Defendant. :

- - - - - - - - - - - - - - - - - - x

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

W. CULLEN MAC DONALD, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, and, as such, have been assigned and am familiar with the above-captioned matter.

2. This affidavit is submitted in further opposition to the defendant HOFFER's motion for a new trial under the provisions of Rule 33, Fed. Rules of Crim. Proc.

3. Attached hereto as Exhibit A through E, respectively, are affidavits of James LaRossa, John McGillicuddy and Michael DiRenzo together with two additional statements from Steve Berman.

W. CULLEN MAC DONALD
Assistant United States Attorney

Sworn to before me this

day of December, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X

UNITED STATES OF AMERICA

AFFIDAVIT

72 CR 1365

v.

HARRY HOFFER,

Defendant, Petitioner
----------X

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

JAMES M. LA ROSSA, being duly sworn, deposes and says:

1. I was retained by Harry Hoffer in the matter of United States v. Harry Hoffer, et al.

2. At no time did I have a conversation with Alfred Hemlock involving the issue of keeping Mr. Hoffer off the witness stand because his testimony would be beneficial to the Government's case.

3. At no time did I have a conversation with Mr. Hemlock, Mr. Mac Gillicuddy, Mr. DiRenzo or the defendant Stephen Berman with respect to the issue of Mr. Hoffer's testimony and the repercussions of his testimony to the other defendants.

4. At no time did I have any conversation with Mr. Hemlock and Mr. DiRenzo with respect to keeping Hoffer in line and keeping him from cooperating with the Government.

James M. La Rossa

James M. La Rossa

Sworn to before me this
3rd day of December, 1976

Dianne T. Rabb

DIANNE T. RABB
NOTARY PUBLIC, STATE OF NEW YORK
NO. 41-4617067
QUALIFIED IN QUEENS COUNTY
COMMISSION EXPIRES MARCH 30, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA

-against-

HARRY HOFFER

----------x

AFFIDAVIT

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

JOHN M. McGILLICUDDY, being duly sworn, deposes and says:

That I have read the affidavit of Stephen Berman dated June 3rd, 1976.

With respect to paragraph 2 of said affidavit wherein it is stated that a conversation was had regarding securing an attorney for HARRY HOFFER that could be controlled the statement is false.

With respect to paragraph 3 of said affidavit wherein it is stated that HARRY HOFFER was prevented from testifying for the reasons therein assigned, the statement is false.

JOHN M. McGILLICUDDY

Sworn to before me this
3rd day of December 1976.

Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA

-against- AFFIDAVIT

HARRY HOFFER

----------x

STATE OF NEW YORK :
SS:
COUNTY OF NEW YORK :

MICHAEL P. DIRENZO, being duly sworn, deposes and says:

I have seen and read the affidavit of Stephen Berman sworn to June 3rd, 1976, before Victor Perez, a notary public of the State of New York.

The affidavit recites that on said date he was incarcerated at Allenwood Federal Prison Camp.

In connection with the above matter, I was asked who I thought was a competent trial attorney versed in criminal law. I did suggest and recommended James LaRossa, Esq. I cannot say with certainty that Mr. Berman was present at this inquiry.

I was not made aware of the fee charged or the manner of payment.

There was absolutely no mention, directly or indirectly, that Mr. LaRossa could or would be controlled.

During the trial all counsel and defendant(s) on occasion had lunch together at Gassner's Restaurant but there was no mention by Mr. LaRossa that if Mr. Hoffer testified all defendants would be convicted with the possible exception of Hoffer.

There were no discussions among Mr. Hemlock, Mr. LaRossa and myself where the subject was "keeping Hoffer in line and keeping him from co-

operating with the Government."

I did however, have an occasion to state that I thought Mr. Hoffer would be a poor witness.

Sworn to before me this

3rd day of December, 1976.

MICHAEL P. DIRENZO

Notary Public

Steve Berman
P.O. Box 1000
Montgomery, Pa., 17752

Dear Cullen:

I spoke to Gary last week and he mentioned to me the statements that John Frank and I gave Harry Hoffer. Neither of us meant to indicate that Harry was innocent of anything and would have been acquitted if he had been represented differently. At that time Hemlock's only concern was that Hoffer would make a deal with your office and plead guilty and then testify against us. Hemlock arranged through Mike Direnzo to get LaRossa and to convince Hoffer that he would be in better position if he went along with us. In fact Hoffer was far more culpable than Frank and I, as he had gone to Canada, arranged for the land, then went to Nassau and arranged all the details. John and I, while willing to go along did not know of the details themselves until Hoffer had arranged them. Hoffer met almost weekly with Mrs. Dominguez as he was advising her regarding her tax situation and he indicated to her that the land investment would be a tax boon for her.

At the time of the trial, Hemlock was concerned that Hoffer would fold up, and then testify for you. He was able to convince LaRossa to go along with the case until such time as your case was finished.

When you rested the Government's case, La Rossa, Bender and my attorney were convinced that there would not be any conviction, thus no defense was put in. We had a fairly heavy defense planned, and then it was scrapped, as the three attorney's felt that enough reasonable doubt existed to insure at least a hung jury. No expert had testified as to the actual value of the land and we had one ready to go. I think that at the time of the deliberations, even you were not sure that a conviction was going to come out of the jury room.

John and I felt that Harry was going to use the statements as mitigation for the Bar association. I think that after serving only about 8 months and getting only a suspension from the bar, he came out pretty well, all things considered. He was paid $25,000 at the time of the land deal and in addition got a Law Partnership from Hemlock which is still paying him plenty. All in all, he recieved more than any of us.

While it is true that La Rossa was hired by Hemlock and paid by the three of us, he did state that if he felt that the case was going badly, he would place Hoffer on the stand to mitigate his own position.

Everything else is o.k., I finally hope to see the Parole Board in February and god willing will get out. I have been in the position where I have seen numerous men go to the parole board with all kinds of recommendations and they really don't help. They seem to blindly follow guidelines which in my case would mean that I would serve the same sentence that I had before Judge Pollack reduced it. The ironic part is that Hemlock with his total aggregate of 7 years will serve the same 28 months that I will if my Parole is denied!

I hope all is well with your family and your back has gotten better. We have a damn good chiropractor here at Allenwood and

Exhibit L

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while I didn't believe in them before, I do now.

I have had some problems at home with my son but hope that if I am paroled, I will be able to straighten everything out. I plan to go to work for a New York antiques dealer on a pertcentage basis and should be able to make a fairly comfortable living. I appreciate everything that you are doing for me and wish you and yours a happy holiday season.

Best regards,

95

P.O. Box 1000
Montgomery, Pa. 17752

PM 3:33
S. D. N. Y.

Dear Cullen:

I recieved a letter today from Ralph Naden, atty for Hoffer. He states that he will subpeona John Frank and myself to testify at a hearing regarding Hoffer's motion for a new trial.

Both John and I [illegible] Naden to tell him that we cannot aid him, as anything that we could state would merely be hearsay, and be repeating what Hemlock told us. In addition, his client was at least as culpible as we were and more, since he actually carried out all the mechanics of the deal.

If you want us to come to New York to testify at the hearing on behalf of the Government, we are both willing to do so. We would appreciate it if you would write a letter to Superintendent Jensen at the above address and request that we be furloughed for 48 hours, or for however long the matter will take. The camp here is terribly overcrowded, and if we go down to M.C.C. on a writ, we would lose our beds and when we return, will be forced to live in a crowded hallway for several weeks before we can move back into the dorms.

Best regards,

Exhibit E

Thereafter she --

THE REFEREE: She was divorced?

MR. McGILLICUDDY: Yes, she was divorced.

THE REFEREE: And remarried?

MR. McGILLICUDDY: And remarried, yes.

THE REFEREE: But, you haven't put in evidence her second husband's name. Will you please?

THE WITNESS: Her first husband was Mr. DeLeon mean Leon and after her divorce she married a Mr. Dominguez.

Q Did there come a point in time where you were indicted in the United States District Court for the Southern District of New York on charges which are embodied in the indictment which is annexed to the petition which has been filed in these proceedings?

A Yes, sir.

Q Did you go to trial on that indictment before Mr. Justice Pollack and a jury?

A Yes, sir.

Q And, did the jury in that case convict you of certain counts of that indictment?

A Yes, sir.

Q In the trial of that case, after the government

had presented their case, did you as a defendant offer any evidence in explanation or exculpation?

A No, sir.

Q Was the case presented to the jury solely and wholly on the evidence presented by the government?

A Yes, sir.

Q Did that pertain to the three co-defendants who were on trial with you?

A Yes, sir.

Q Is there a reason that you can give for your failure to testify in that criminal prosecution?

A Yes, sir.

Q Would you give the Referee that reason?

A Yes. Up to that point I had never handled any criminal matters in my entire legal practice. I was represented by an attorney who was familiar or had knowledge or was involved in cases in the -- in criminal cases in the Federal Court. I told him that I wanted to testify and he told me, and my wife who was also there, that in his opinion he didn't believe that the government had proved a case, had introduced sufficient evidence and therefore he said, "I don't believe you should testify."

It was a judgment that I regret to this day but it can't be reversed, that I didn't testify. I wanted to, but, you know, the old expression, someone who represents himself has a fool for an attorney and especially --

THE REFEREE: You mean he has a fool for a client.

THE WITNESS: I am sorry, he has a fool for a client and an attorney. I had no experience on which to impress my feeling because I didn't know anything about this type of thing and when an attorney experienced says to me, "Don't testify" even though it is my instinctive reaction that I have to come forward, I have to listen to him.

I think that is the biggest mistake I made in my life.

Q Now, after that jury verdict, did there come a point in time --

THE REFEREE: Incidentally, you weren't represented then by the lawyer who is representing you now, let the record show that.

THE WITNESS: No, sir.

THE REFEREE: You say I am wrong about that?

THE WITNESS: You are right. I am not represented by the same attorney.

THE REFEREE: All right.

THE WITNESS: Nor was I represented in any of the appeals by the same attorney.

Q Now, after the jury verdict, did there come a point in time where you were sentenced by Judge Pollack?

A Yes, sir.

Q What was the date of that sentence?

A It was in September -- I don't know the exact date, September, 1973.

Q Prior to that sentence and on or about June 20, 1973 did you prepare an affidavit which was submitted to the Court and which became part of the Court record in the Southern District relative to your participation in the subject matter of the indictment?

A Yes, sir.

Q I show you this affidavit dated June 20, 1973 and ask you is that an exact copy of that affidavit?

A Yes, sir, it is.

MR. McGILLICUDDY: Do you have it, Mr. Cohen?

MR. COHEN: This one?

MR. McGILLICUDDY: Yes, sir. I would offer

later embarked upon, as I understand it, a very extensive renovation.

THE REFEREE: You had nothing to do with that?

THE WITNESS: No, I did not.

THE REFEREE: Try to be careful when you answer a question, not to say "no," if you mean yes because the record will not look right. If I ask you, "You had nothing to do with it" and you say "No" that means my question is wrong.

THE WITNESS: I'm sorry.

THE REFEREE: I understand. This happens all the time.

Q Was there any other services that you rendered to Mrs. Leon in the year 1967?

A No.

Q Getting to the two land transactions which are the subject of this inquiry, one was held in January 11, 1968; is that correct?

A Yes.

Q And there was a similar transaction handled on February 5, 1968?

A Yes, sir.

Q Did the first transaction relate to a

corporation by the name of Columbia -- were there more words?

A Columbia Corporation, Ltd.

Q And the second transaction related to what corporation?

A Splindian Investments Corporation, Ltd.

Q Were those two corporations -- and was a corporation, Planinvest involved in the transfer of these properties?

A Yes, sir.

Q Is the property which is the subject of these transactions, was it situated in Canada?

A Yes, sir.

Q Were there two separate parcels of property located in Canada?

A One related to -- one parcel.

Q There were two parcels?

A Yes.

THE REFEREE: You mean two separate?

MR. McGILLICUDDY: Two separate parcels of land.

THE REFEREE: Each one the subject of a separate transaction?

MR. McGILLICUDDY: Of a separate transaction.

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Q And ultimately, were the transfer of title to the separate parcels of land accomplished in Nassau, the Bahamas?

A Yes, sir.

Q When did you first receive any information or knowledge of a contemplated transfer of property and from whom did you receive --

MR. COHEN: One question at a time.

THE REFEREE: I think it is better that you break it up, Mr. McGillicuddy.

Q The first question is, when did you first receive any information relating to those contemplated transfers?

A I believe --

THE REFEREE: Would you excuse me? May we clarify one thing? The first transaction related to a piece of property. Was it in Sherwood or Sherbrook or something?

THE WITNESS: Sherbrook, I believe.

THE REFEREE: And where was the second piece of property?

THE WITNESS: In Montreal, I don't know where.

THE REFEREE: But not the same property?

THE WITNESS: No.

THE REFEREE: Taking up the first one, was your question, Mr. McGillicuddy.

MR. McGILLICUDDY: Yes.

THE REFEREE: You are talking about Sherbrook now?

MR. McGILLICUDDY: Yes, Sherbrook.

Q When was it that you first received any information or knowledge of a contemplated transfer?

A I believe it was sometime toward the end of November, 1967.

Q From whom did you receive such information or knowledge?

A From Mr. Hemlock.

Q Did you have a conversation with him?

A Yes, sir.

Q Did that take place at your offices at 250 Broadway?

A Yes, sir.

Q What did he tell you?

A He told me that Mrs. Dominguez, Mrs. Leon, had not yet paid Mr. Berman, Mr. Frank and himself the amounts that were due to them as a result of what they accomplished

for her in Spain; and that she had desired to do this for a variety of reasons, through the purchase of land and the sale of land.

In other words, the purchase of land by Mr. Hemlock, Berman and Frank, and the sale of land to her at a higher price and the difference being toward their remuneration.

Q At that time, was there a discussion as to what remuneration Mr. Berman, Mr. Frank and Mr. Hemlock were to receive?

A Yes, sir.

Q What was that consideration?

A I was told that as a result of everything that they had gone through and the peril that they had put themselves in, she had agreed to pay $1,000,000 which was to be divided between them.

THE REFEREE: Between whom?

THE WITNESS: Berman, Frank and Hemlock.

THE REFEREE: Did you know in what purportion?

THE WITNESS: To my knowledge it was supposed to equal.

THE REFEREE: When you say "to your knowledge", were you told that?

THE WITNESS: Yes.

THE REFEREE: And that is by Mr. Hemlock, I take it?

THE WITNESS: Yes.

Q And you say that the vehicle that was going to be used was the purchase of land. Were you told where the land was?

A At that time I was told that she wanted it to be -- the land to be in Canada but not the -- not where the -- you know, not the particular piece of land.

Q Were you told at that time where the closing was to be held?

A No.

Q After that conversation, what was the next thing that occurred in point of time?

A I had a further conversation with Mr. Hemlock indicating -- in which he told me that she wanted the closing to be outside the United States and the reasons for that were as follows. She was a -- either an alien or had just received her green card which is the resident alien status, I believe, and, all the corporations which she owned were outside the United States and she didn't want, first of all, any of these

transactions to be regarded in the United States taxation. And if she were an alien and these transactions were by corporations outside the United States like, Planinvest I believe was a Luxemburg corporation, it wouldn't have any effect on the United States.

THE REFEREE: I don't know what you mean by "affect on the United States."

THE WITNESS: Affect the United States taxation.

THE REFEREE: Oh.

THE WITNESS: I am sorry if I didn't make myself clear.

THE REFEREE: That's all right.

THE WITNESS: That's why the land was to be outside the United States also. There were a couple of other reasons too, that I was told.

One, there was an expropriation order issued by the Dominican Republic. This expropriation order said that any property which she or her family had, was the property of the Dominican Republic and was expropriated, it could be taken wherever it could be gotten and I was told she was afraid that this expropriation order would follow

her any place she went and that was one of the reasons why these corporations were bearer corporations.

THE REFEREE: By bearer you mean the stock was not made out to any particular individual?

THE WITNESS: No. I understood, I was told that in certain countries like Luxemburg or Panama when a corporation is formed they give you indicia of ownership, a certificate. Now, the person -- it would be like the bonds, the bearer bonds that we have. Whoever holds the certificate owns the corporation.

THE REFEREE: That's what I meant to ask you.

MR. COHEN: Objection.

THE REFEREE: In other words, it is not made out to any particular person?

THE WITNESS: No, the bearer.

MR. COHEN: Mr. Referee, the witness has said "I was told." I would like to know if he was told this by Mr. Hemlock.

THE WITNESS: I am sorry, I was told this by Mr. Hemlock. That is, with regard to the expropriation order.

THE REFEREE: Would you mind if he finishes his answer, Mr. McGillicuddy?

MR. McGILLICUDDY: I just wanted to make an offer dealing with that and his answer, I think is somewhat lengthy.

THE REFEREE: He is in the middle of a sentence, really. What was the other thing you were told?

THE WITNESS: That when her father died there were, so-called, illegitimate children of her father in the Dominican Republic who claimed a portion of the assets that the family -- when I say the family I mean her mother, her two brothers and she -- had taken, and they had instituted a lawsuit in Switzerland against all of them to recover a portion of these assets and she didn't want any of these -- for the sake of a better word -- illegitimates to know anything about what she owned or her assets or her corporations.

And that was -- those were the reasons that were told to me.

THE REFEREE: You were telling us why this was to be property outside the United States. What

has this to do with that last point that you made?

THE WITNESS: Well, the transaction was also, when I say the closing was also to be held outside the United States so that the records would not be available and accessible to these illegitimates in discovery proceedings.

THE REFEREE: You mean in the United States?

THE WITNESS: Yes, sir.

THE REFEREE: Now Mr. McGillicuddy, I am sorry to have interrupted you but I thought it would be better to let the witness finish his answer.

MR. McGILLICUDDY: Of course. At this time I would offer in evidence a document which is an expropriation order which is dated November 7, 1963. May I make this observation? The offer that I now make of this expropriation order was received in evidence on the trial and is embodied in the exhibit volume. This may appear to be somewhat of a duplication. However, the duplication which I intend may be to the extent of three or four exhibits. I think that these exhibits are completely relevant to this defendant's state of mind and it more or less -- so rather than point out the

certain ones that we could have them, as separate exhibits.

MR. COHEN: No objection.

THE REFEREE: Received.

(Expropriation order dated November 7, 1963 was received in evidence and marked Respondent Hoffer's Exhibit F.)

THE REFEREE: Mr. McGillicuddy, the witness having told us that there was an expropriation order made in the Dominican Republic and, generally speaking what its extent was, what is it your understanding that we add, that you add, by having the order itself inevidence? I just want to make sure I don't overlook any point you have in mind.

MR. McGILLICUDDY: The point that I have is, although he didn't see or we didn't have possession of that order at that time, this document corroborates the information that was imparted to him by Mr. Hemlock and what his state of mind was there, when he was told that she could not have holdings openly and notoriously, that she must have them in a secret way.

THE REFEREE: Very well.

Q After these conversations with Mr. Hemlock, was there anything that you actually did preparatory to the first land transaction?

A Yes, sir.

Q What did you do?

A I went to Canada.

Q Will you tell us when?

A December of 1967.

Q Will you tell us who requested you to go to Canada?

A Mr. Hemlock told me to go to Canada with him.

Q What transpired in Canada?

A We met with a Mr. Kay.

Q Why were you directed to go to Canada rather than Mr. List who was in the office and an attorney?

A This involved real estate and this is what my function was in the office.

Q Would that same answer apply to Mr. Becker?

A Yes.

Q Wald you continue?

A We met with a Mr. -- we met with a Mr. Hebert.

Q Where did you meet with him?

A In his office in Montreal.

Q Who was Mr. Hebert?

A Mr. Hebert I was told by Mr. Hemlock was a friend of Mr. Hemlock's and was an attorney in Montreal.

Q What transpired?

A Mr. Hebert brought in Mr. Kay, Arthur Kay.

Q Who is Mr. Arthur Kay?

A Mr. Hebert said that Mr. Kay is in the real estate business and "If you want a piece of property in Canada, Mr. Kay is the one to see."

THE REFEREE: By this time they already had a piece of property in Canada, didn't they?

THE WITNESS: No, sir.

THE REFEREE: I beg your pardon. Go ahead.

THE WITNESS: I said that there was no property at that time yet determined.

THE REFEREE: I am sorry. I assumed you were telling us about the closing. This is prior to any closing?

THE WITNESS: Yes. This is in December of 1967.

THE REFEREE: Very well. Gentlemen, it is close to 1:00 o'clock. I know if you want to get into a restaurant it is a good thing to get there

before five or ten after one or you won't be able to get a seat. So I would suggest that we take a recess now. You go out and get your lunch and let us start at 2:00 o'clock.

(Luncheon recess.)

AFTERNOON SESSION

THE REFEREE: I wonder whether we can save Mr. Cohen the necessity of checking into the actual non-residents of the various witnesses who testified at the criminal trial by stipulating that we will concede that the testimony of all the witnesses who testified at the criminal trial may be read as part of the minutes of this hearing. I am not urging it at all.

MR. McGILLICUDDY: No, no, we had discussed this before.

MR. KOENIG: As I understand it, Mr. Referee, there are only one or two witnesses about whom there is any doubt in Mr. Cohen's mind and as far as they are concerned, they seem to be of a minor character.

THE REFEREE: I don't want to make any representation to you as to how important those witnesses were, but if I know who they are, I could readily tell you what they did testify to because my notes have it -- my abstract of the minutes will tell in a moment just what each person

testified to.

MR. KOENIG: We are not concerned about that at this time. The only question is whether Mr. Cohen should be put to the task of making a representation to you that the witness is unavailable pursuant to the statute. As I understand it, the only possible witness about whom there- is any doubt is Mrs. Reilly who may be in New York State.

As I recall her testimony, we are not making any contentions as far as she is concerned.

THE REFEREE: I will tell you what Miss or Mrs. --

MR. KOENIG: Mrs.

THE REFEREE: I will tell you what she testified to.

MR. KOENIG: We are familiar with the testimony.

THE REFEREE: She testified that Mr. Hoffer and Mr. Hemlock wanted immediate clearance, you recall, of a check which was deposited and they called Mr. Hoffer and Mr. Hemlock's attention to the fact that that would take eight days and thereupon Messrs. Hoffer and Hemlock suggested that they send a messenger to New York from Nassau

and that was done, she being the messenger. And, she took the trip. When she got here she had the check approved and that was about it, and then she had the same procedure on two later occasions. That is all Mrs. Reilly testified to.

But, I don't want to make any representations. These are my notes.

MR. KOENIG: That is in accord with the testimony as I recall.

THE REFEREE: It really wasn't essential. Nobody questions the fact that the check was brought here. It was cleared up here and then they went on their way.

MR. KOENIG: No issue there.

THE REFEREE: So, may we have -- what do you want to say about it?

MR. McGILLICUDDY: We would be willing to stipulate on behalf of the respondents, as a result of our investigation, that all of the witnesses who testified in the Federal Court to the material issues which are presented for you for determination, are beyond the jurisdiction of this Court and there would be no way to compel them or their appearance

Q So that concluded all the work with Mr. Hepburn?

A Except later he assisted me in obtaining the use of the board room at the First National City Bank for the closing.

Q After you left his office, did you go some place and did you do something and were you instructed to do it andby whom?

A Yes. I was instructed to go to the First -- I was instructed by Mr. Hemlock to go to the First National City Bank in the Bahamas and to open a checking account in the name of Columbia Corporation, Ltd.

Q Is that a branch of the First National City Bank that is established here in New York City?

A Yes, it is.

Q And you went there; what did you do?

A I opened an account in the name of Columbia Corporation, Ltd.

Q And, did you sign any cards; what did you do?

A Mr. Hemlock wired $5,000 down to me, from New York to Nassau and I signed a signatory card as the assistant secretary because I was the only one down there.

THE REFEREE: To whom did he wire the $5,000?

MR. COHEN: He just testified. He said he wired it to him.

THE WITNESS: To me or to the bank, it came to the bank, you know, the $5,000 came to the bank. I don't remember whether it was addressed to -- it came through the New York bank to the bank in Nassau so when I say "wired", youknow, transmitted.

THE REFEREE: I know what wiring money is.

THE WITNESS: It was transmitted from the New York bank.

THE REFEREE: Who was to have the authority to draw it?

THE WITNESS: I was.

THE REFEREE: You were?

THE WITNESS: Yes.

THE REFEREE: As an assistant secretary; is that the point?

THE WITNESS: Yes. So I became the signatory on the checking account and opened up the checking account and transmitted I think by wire that same day, $5,000 on instructions from Mr. Hemlock to Mr. Kay in Canada as a binder to insure that he

would be down for the closing of the property.

THE REFEREE: Was that to be drawn out of the account you had opened down there or was that other money?

THE WITNESS: That was the $5,000 sent down.

THE REFEREE: You put the money in and took the whole thing right out?

THE WITNESS: Yes.

THE REFEREE: And what was Mr. Hepburn down there to do with the $5,000? Who got the $5,000? I thought you said Mr. Hepburn got it.

THE WITNESS: It came into the bank, the First National City Bank.

THE REFEREE: What happened to it then?

THE WITNESS: It was in the account of Columbia which I was the signatory of, of the checking account.

THE REFEREE: True.

THE WITNESS: And I had it transmitted on instructions to Mr. Kay in Canada.

Q Who was Mr. Kay?

A Mr. Kay was the vendor.

THE REFEREE: And the inst-ructions came from

whom?

THE WITNESS: From Mr. Homlock.

THE REFEREE: What did you do then in response to those instructions?

THE WITNESS: I had the money transmitted.

Q What did the $5,000 that was remitted to Mr. Kay, represent?

A It represented a downpayment or a binder on the transfer.

Q After you concluded your business with the bank, what was the next thing that you did?

A Well, I contacted Mr. Hemlock and told him what had been done and he told me when he and the other people involved would be down to Nassau.

THE REFEREE: What other people?

THE WITNESS: Mr. Kay came down, Mr. Hebert came down.

THE REFEREE: No, whom did he tell you would come down?

THE WITNESS: The other people involved in the real estate transaction.

THE REFEREE: That's the way he put it?

THE WITNESS: To the best of my recollection.

closing, to insure that he would be down. That was my instruction. That accounts for $5,000.

THE REFEREE: With what did you fortify the account to make up the $788,000 or whatever the figure was?

THE WITNESS: At the closing on January 11, Mr. Lefkowitz presented a certified check on the account of Planinvest, that's whose check it was, signed by Mrs. Leon made payable to the order of Columbia Corporation, Ltd. This check, after the deeds were signed, was deposited in the Columbia Corporation account.

THE REFEREE: By whom?

THE WITNESS: By me.

Q What was the next thing that occurred?

A I wanted to draw -- Mr. Kay wanted his money for the balance of the $100,000, a little over $100,000 for the purchase price. The Notary wanted his money. Mr. Adessky wanted his money, et cetera, and the bank said, the bank manager said that this check, although certified by a New York bank --

THE REFEREE: By "this check", you mean the one Lefkowitz brought in?

THE WITNESS: Yes, this $778,500 check, although certified by a New York bank, "We are down in the Bahamas and before that check can clear it would take seven or eight days for it to go up and clear," and Mr. Hemlock asked the manager, Mr. Latvis and said, "Is there any way we can get fast clearance on this check because we have to make payments on it?"

MR. COHEN: Who made that request -- excuse me?

THE WITNESS: Mr. Hemlock asked Mr. Latvis. Mr. Latvis said, "If it were brought up immediately to the First National City Bank, the Federal Reserve Bank, it would clear immediately." So, Miss Reilly was Mr. Latvis' secretary and sat near Mr. Latvis and I don't remember whether he asked her or she turned around and said, "I will go" and volunteered.

But, in any event, she was to go and deliver the check up to New York.

THE REFEREE: You are a little bit ahead of me. Before she said she would go, didn't somebody suggest that a messenger be sent up to New York?

THE WITNESS: Yes, that's what I said. When

the question came up as to the clearance of the check, Mr. Latvis said that the only way this check could be cleared quickly is if someone brought it up, someone from the bank because if the deposit is made in the bank, the bank would not give up possession of the deposit, you know, the check, it would have to be a representative of the bank thatwould bring it up. Either it goes up in a pouch that they send up or by mail or brought up.

So, at that point, Miss Reilly said she would go.

THE REFEREE: Do you recall that at the criminal trial she testified that you and Mr. Hemlock suggested that a messenger be sent up; is that your recollection?

THE WITNESS: Of her testimony,yes.

THE REFEREE: Of the fact.

THE WITNESS: I can only answer it this way. I was there. I was standing there.

THE REFEREE: And so was Mr. Hemlock.

THE WITNESS: There was a conversation between Mr. Hemlock and Mr. Latvis about the quick clearance of the check and the necessity of it. And, the --

THE REFEREE: You mean you were not a party to that conversation, you were just a spectator or a listener?

THE WITNESS: I was standing there, yes, I didn't participate in the conversation.

THE REFEREE: All right.

THE WITNESS: And, I believe it was Mr. Latvis that said that the only way you can get quick clearance is by bringing the check up quickly, by having it hand-delivered.

Now, as to whether Mr. Hemlock said, "Well, can you send up Miss Reilly" or whether Miss Reilly turned around and said, "I'll go", or whether Mr. Latvis said, "We can send someone from the bank", that, I don't know and I don't recall as to that verbiage.

But, it was decided that Miss Reilly would go. And, Mr. Hemlock gave her money for a plane ticket and since she would incur expenses in going to the airport, in an overnight stay in New York and in the trip back, you know, the carfare whatever, back, he gave her $100 for expenses.

THE REFEREE: In cash?

THE WITNESS: Yes.

THE REFEREE: By what instruction did you deposit that $780,000 check in the Columbia account?

THE WITNESS: Mr. Hemlock told me, "Put it into the account and then we will draw it out."

THE REFEREE: All right.

THE WITNESS: Now, the next day the bank was able to give credit --

THE REFEREE: You mean the next day after Miss Reilly came back?

THE WITNESSS: No, after Miss Reilly left.

Q That would be on the 12th?

A On the 12th. The day after the bank was able to give clearance. Miss Reilly left the 11th.

THE REFEREE: When did she come back?

THE WITNESS: I don't know when she came back. I don't know when she came back.

THE REFEREE: According to what you are telling us, as I understand it, the manager wouldn't give you credit until he got the clearance back from New York, would he?

THE WITNESS: Well, you see, the main office of the First National City Bank is in Manhattan.

THE REFEREE: Yes.

THE WITNESS: Now, she would bring it up. She was to bring it up and clear it through the Federal Reserve Clearing House, I believe, through the First National City Bank in Manhattan and when they, in Manhattan found out we have got our funds, then they let Mr. Latvis know, "Okay, pay."

THE REFEREE: So what you are telling us, there must have been a Telex or some other method by which the New York bank told the Nassau bank so that the Nassau bank was ready to let you draw against the check by the 12th?

THE WITNESS: Yes.

THE REFEREE: All right.

THE WITNESS: There must have been some communication.

THE REFEREE: All right.

Q What happened on the 12th?

A A bank check -- a -- not a check from the corporation, a bank check was drawn to Mr. Kay for $100 -- under $101,000, one hundred thousand some odd dollars in payment of the balance of the money due for the property. I drew checks at the direction of Mr.

Hemlock telling me who to pay and what to pay to Mr. Kay -- not to Mr. Kay, to Mr. Adessky, to Mr. Solomon, to Mr. Hepburn for the formation of the corporation, reimbursement of expenses that had been expended, checks were drawn.

THE REFEREE: Did you have power to draw checks on that account?

THE WITNESS: On that checking account, yes.

THE REFEREE: Who signed the signature cards?

THE WITNESS: For the checking account, I did.

THE REFEREE: Alone?

THE WITNESS: As assistant secretary, yes.

Q You were the sole signator on that account?

A On that checking account I was the sole signator.

MR. COHEN: On the Columbian account?

THE WITNESS: On the Columbia account.

THE REFEREE: Were you instructed by anybody to become the sole signatory on that account or how did you do that or why did you do that?

THE WITNESS: Yes. I was instructed, I was instructed by Mr. Hemlock, I was instructed by telephone and the reason for it was that I was down in the Bahamas opening up the account prior to anyone else coming down. And, to open the

account someone had to -- an officer had to open the account. That's when Mr. Hemlock advised me to become assistant secretary and open the checking account.

THE REFEREE: Do you recall when that was done, Mr. Hoffer, with respect to the 12th, within the preceding few days?

THE WITNESS: It was within three or four days before because I was only down there for three or four days.

THE REFEREE: All right.

THE WITNESS: Now, there is a balance of money left in that checking account.

Q Approximately how much?

A $600,000 some odd.

Q What happened to it?

A That money was transferred to three time deposit accounts.

THE REFEREE: Transferred by whom?

THE WITNESS: Well, by instruction from Mr. Hemlock, by me, because I was the signatory on that checking account. Now, I don't recollect whether it was done by check or by advice to the

bank, you know, to say, "Transfer it."

THE REFEREE: By this time Mr. Hemlock is there with you?

THE WITNESS: Yes. This is on the 12th. And, three time deposit accounts were opened in the name of Columbia Corporation, Ltd. Each of these time deposit accounts had one signatory. In other words, if I refer to them as Columbia A, B and C, Columbia A had one signatory who was able to sign, withdraw, take, use or do anything with that account.

THE REFEREE: And who was that signatory?

THE WITNESS: Mr. Hemlock. Now there is the second time deposit, Columbia B, that there was only one person who was able to sign, withdraw, break, take out or do in that.

THE REFERDE: Who was that?

THE WITNESS: That was Mr. Berman. And then we have the third.

MR. COHEN: Under what name was Berman operating?

THE WITNESS: Steven Berman. The third account there was only one signatory who could withdraw the money and take it out and take the

money out of the time deposit and use it or what, in other words, only one person had access to that account and that was Mr. Frank.

THE REFEREE: Mr. who, Frank?

THE WITNESS: Frank.

THE REFEREE: In what banks were these time deposits opened?

THE WITNESS: In the same bank, the First National City Bank.

THE REFEREE: Down in Nassau?

THE WITNESS: Down in Nassau. I was not a signatory of any time deposit account. I had no control of any time deposit account. I had no authority on any time deposit account.

THE REFEREE: Who told you to do that?

THE WITNESS: Mr. Hemlock. This was, as he told me, their division of the monies that were due -- and part of the monies that were due to them from Mrs. Leon as a result of what they had done on her behalf.

Q In effect, you didn't open the time deposit accounts, they individually opened the three accounts?

A Yes, they were the signatories.

Q They were the ones that opened them?

A Yes.

THE REFEREE: So that you drew checks on the Columbia account and you handed them to somebody who used them to open time deposit accounts?

THE WITNESS: No, sir, that is not my recollection.

THE REFEREE: Why not?

THE WITNESS: My recollection is that I advised the bank -- in other words, I am standing in the bank and the money is in the account so instead of saying, "Here is three checks to Columbia A, Columbia B and Columbia C" I think they gave me an advice to sign, a form, say, transfer, you know, transfer this money to Columbia A, B and C instead of three separate checks. They, you know, did it by one advice.

THE REFEREE: And these accounts you say were opened right in the same bank?

THE WITNESS: In the same bank.

THE REFEREE: So it was a bookkeeping transaction by them, in effect?

THE WITNESS: Yes, except that the control at

that point of the funds, although in the name of the corporation, were controlled by the single signatories of each account.

THE REFEREE: From that point on?

THE WITNESS: From that point on.

THE REFEREE: Well, was Mr. Frank there at the time?

THE WITNESS: In the bank at that time? No.

THE REFEREE: Who signed the card for the portion that went to him?

THE WITNESS: I was told that he was going to come in later and sign the card.

THE REFEREE: Was Mr. Berman there?

THE WITNESS: Not to my recollection.

THE REFEREE: Who signed the card for him?

THE WITNESS: I was told he was coming in later to sign the card.

THE REFEREE: And Mr. Hemlock was there?

THE WITNESS: Yes, sir.

THE REFEREE: And he signed the card right there, did he?

THE WITNESS: He did.

THE REFEREE: Thank you.

Q What approximate sums were transferred to the three accounts that you have just mentioned?

A Approximately $215,000 to each one.

Q As a result of these transfers and the various checks which you told us that you had written, to Mr. Kay and others for expenses, what was the balance in the Columbia account?

A I don't believe there was anything left.

Q It cleared the account out?

A I think so, yes.

Q Did anything further happen in Nassau, Bahamas?

A That day?

Q That day, the next day?

A Yes. Mr. Solomon -- well, this is during the closing, I am going back in time a little, had asked Mr. Hemlock for copies of the charter -- the certificate of incorporation of Columbia Corporation, Ltd. and of Planinvest so he could have it in his records. Other than that, I don't recollect anything further. I went back to New York.

Q After January 11 when you had the closing, when would you say you returned to New York?

A If I remember correctly then the 12th, after the

transfers were made.

Q After you got back to New York, did you do anything further relative to those land transactions?

A Yes.

Q What did you do?

A Within a short period of time I sent down a copy of the Columbia Corporation, Ltd. certificate of incorporation -- not sent down, I sent to Mr. Solomon in Canada a copy of it, and Mr. Hemlock obtained for me, a week or so later, a copy of the Planinvest certificate of incorporation which was in French, you know, that there was a Luxemburg corporation so their charter is in French and Mr. Solomon being in Canada which is, you know, in Montreal, is bilingual, French and English, and I not knowing one word of French, I sent him up that charter -- certificate of incorporation.

THE REFEREE: Is that the same thing as he refers to as the letters patent?

THE WITNESS: Yes, letters patent, articles of incorporation, certificate of incorporation, depending upon the jurisdiction, I understand these are interchangeable words.

Q Was there anything further you did or did you

ever receive any further instructions relative to that first transaction other than what you have described?

A No. That was a completed thing at that point.

Q After that first transaction, did you -- did there come a time when you had a conversation with Mr. Hemlock regarding a second transaction?

A Yes.

Q When was that conversation, where was that conversation and what was the substance of the conversation between you and Mr. Hemlock?

A The conversation was around the end of January, the last few days in January or the beginning of February, you know, the last -- just around the end of January, 1968 and the place was in our office and the conversation was that there was going to be another transaction involving Splindian Investments, Ltd., the other corporation which I had formed and which was to be similar in nature to the transaction that had been completed with Columbia in that this was to be another portion of payment with regard to the fees that had been earned as a result of their representation in Spain of Mrs. Leon.

THE REFEREE: We will recess now for lunch. Be back at 2:00 o'clock.

(Luncheon recess.)

A $200.

Q And what was the consideration paid in the transfer from Splindian to Planinvest?

A $361,500.

Q Which would be a difference of what, approximately?

A Approximately $161 --

THE REFEREE: $161,500. I can do that myself, Mr. McGillicuddy.

Q What were you told that the difference in consideration for the transfers, the two transfers, for the sale of land was for?

THE REFEREE: And by whom?

Q And by whom?

A I was told by Mr. Hemlock that the difference, less the expenses, was in repayment toward amounts owed by Mrs. Leon for work that had been done for her in Spain.

Q After the transactions were accomplished, what was the next step that was taken?

A The check for $361,500 was deposited in the Splindian checking account.

Q By whom?

A By me.

THE REFEREE: Were you directed to do that by anybody?

THE WITNESS: Yes, Mr. Hemlock told me to deposit the check in the account. Now this check, again, was a certified check on a New York bank and the bank could not clear it right then.

THE REFEREE: Which bank are you talking about?

THE WITNESS: I am sorry, the First National City Bank in the Bahamas.

THE REFEREE: Okay.

THE WITNESS: Could not clear it right then even though it was certified because it would have to go through the New York Clearing House.

MR. COHEN: What bank was the check drawn? I know it is improper for me to interject, that is why I am directing my questions to you, Mr. Referee.

THE WITNESS: I am not sure whetherit was the Bank of London --

MR. McGILLICUDDY: Just a minute.

Q If I show you an exhibit, Government Exhibit 7 which was introduced at the time of trial, look at the face of that check, would that refresh your recollection as to the bank -- as to the drawee?

THE REFEREE: My recollection of that, from looking at the record is that it is very indistinct. I wasn't able to make it out when I tried to read it.

THE WITNESS: The Bank of London and South America.

Q Located?

A Located at, the address is -- the number is not legible to me but it is on Williams Street in Manhattan.

THE REFEREE: Is the amount legible on that copy?

THE WITNESS: The typed words, not the number up in the -- you know, when you write in the number, but the line where you type it in.

THE REFEREE: Written out?

THE WITNESS: Yes.

THE REFEREE: Spelled out? Is that legible in the copy you have before you, Mr. Hoffer?

THE WITNESS: What?

THE REFEREE: Is that number legible in the copy you have before you?

MR. COHEN: No, it isn't legible.

THE REFEREE: The reason I say it, as I remember looking at it, checking that record, I

couldn't make out the figures from the paper itself.

MR. McGILLICUDDY: The reproduction is very bad.

THE REFEREE: Do you remember how much the check was for or, after looking at that document, do you recall what the amount of the check was?

THE WITNESS: Can I answer it -- the document that I am looking at is a copy of the check made payable to Columbia Corporation, Ltd. Now, the reason I say that is, the check made payable to Splindian Investments, Ltd., was never produced on the trial in the Federal District Court.

MR. COHEN: In other words, you are mistaken -- excuse me. I must object to this because the witness had been, up until now, referring to an exhibit as though it were in support of his testimony in connection with a transaction dealing between Splindian and Miss Comeau.

THE REFEREE: What is the exhibit number there that you are looking at now?

THE WITNESS: I am looking at two exhibits, 7 and 8.

THE REFEREE: In the record on appeal from

the Federal judgment?

THE WITNESS: Yes. I am looking at 7 and 8.

THE REFEREE: What is 8? 8 is the bank account, a transcript of the bank account?

THE WITNESS: Transcript of the bank account.

THE REFEREE: And it is from that, that you can see that there is a line around $361,500?

THE WITNESS: Yes.

THE REFEREE: And that's what reminds you that that was the amount of the check?

THE WITNESS: Yes, and that's where I get the words "The Bank of London and South America, 84 Williams Street, New York."

MR. COHEN: Not because of the exhibit in evidence in the Federal trial.

THE WITNESS: That is in evidence.

MR. COHEN: Not because of the check itself.

THE WITNESS: With regard to the Splindian transaction, no. The only check is the check made payable to Columbia and is marked in this record.

THE REFEREE: That is the earlier transaction.

THE WITNESS: Yes.

THE REFEREE: And that is so indistinct that

it is impossible to read in there, isn't it?

THE WITNESS: It's indistinct.

THE REFEREE: Anyway we are down to the point now where you can tell from looking at the transcript of theaccount where you find the in and out, that $361,000 was the amount of the check?

THE WITNESS: Yes, sir.

THE REFEREE: All right.

Q What was the next thing that occurred?

A I don't remember what --

THE REFEREE: You now have $361,000 in the Splindian account.

THE WITNESS: I deposited it in the Splindian account. Mr. Hemlock told me to put it in the account.

THE REFEREE: Yes?

THE WITNESS: Again, this is a certified check on a New York bank, the Bank of London and South America and, again, the bank cannot give immediate credit to that check. So they say -- Mr. Hemlock and I are standing there with Mr. Latvis who is the manager. Mr. Latvis says, "I can't give -- " These are not the exact words, I don't remember the

exact words, so what I am trying to do is paraphrase it. "I can't give you immediate credit on this $361,500 so that you can draw on it because the check has to clear in New York. Now, if you will undertake to make sure that this check clears right away in the same manner as before, you know, by sending a messenger up, since you have money in Columbia under your signature, you know, in a time deposit account, as against that account, holding that account, I will advance money on this check."

I don't know if I made it clear.

THE REFEREE: Perfectly to me, I don't know about anybody else.

THE WITNESS: So that is when Miss Reilly again was dispatched to go to New York to effectuate immediate clearance of the check.

MR. COHEN: Before we go further with regard to your observations, perhaps not everybody understands it even though you do, Mr. Referee.

THE REFEREE: I tell you why I understand it, because I read this record.

MR. COHEN: I have some familiarity with the

record but there is one question I am not clear and please forgive me.

MR. McGILLICUDDY: It's all right.

MR. COHEN: Mr. Hoffer did not have any money on deposit in Columbia.

THE REFEREE: That had been turned over into the time deposit.

MR. COHEN: Of Mr. Hemlock?

THE REFEREE: Yes.

MR. COHEN: Then Mr. Hoffer had the Splindian account and they were going to draw against the Splindian account.

THE REFEREE: Yes.

MR. COHEN: So I wonder if the witness would just repeat as to how the Splindian account got credit.

THE REFEREE: Let me tell you what I understood him to say because if I am wrong he can correct me. In effect what they did was to guarantee to the bank down there that the $361,000 check would be paid by telling them, "You can hold for security what has been put into these time deposits." That is the effect of it.

MR. COHEN: Who made that guarantee?

Q Who made the guarantee?

A Mr. Hemlock. He was the signator.

MR. COHEN: I see. All right.

THE REFEREE: Pardon me. Mr. Hemlock didn't have the whole of the amount, he had only one-third of it, didn't he?

THE WITNESS: Yes, sir.

THE REFEREE: One-third wouldn't have been enough to secure the payment of $361,000.

THE WITNESS: But the whole $361,000 wasn't paid out at that time.

THE REFEREE: What you are telling us now is, to the extent that you sought to pay it out at that time, the portion held in Mr. Hemlock's time deposit would be sufficient; is that whatyou are saying?

THE WITNESS: Yes.

THE REFEREE: Tell us about that.

THE WITNESS: Now, there is $361,500 deposited into the account. There is about $215,000 in the Columbia time deposit account that Mr. Hemlock was the signatory of.

THE REFEREE: No, it isn't clear. The money

that remained in Columbia you had told us was split up three ways so that there was not any $200 some odd or $250,000 in Columbia anymore. That had been taken out and put into the accounts of these three individuals, had it not?

THE WITNESS: No. The account was in the name of Columbia Corporation. There were three time deposit accounts set up, three. I am talking about the initial transaction in January. Three time deposit accounts --

MR. COHEN: Each in the sum of how much?

THE WITNESS: Can I please finish? Each was in the name of Columbia Corporation, Ltd. Each was in the name. In other words, the account was titled Columbia Corporation, Ltd. time deposit account number 1, Columbia Corporation, time deposit account number 2 and Columbia Corporation time deposit account number 3.

MR. COHEN: Objection. Up until now it was A, B and C.

THE REFEREE: I understood distinctly that that was just to clarify.

MR. COHEN: I see.

THE REFEREE: Do I understand that in addition to Columbia, that it was drawable, the only person who could draw on it however was, in account 1, Mr. Hemlock; account 2 was Mr. Frank and account 3 was Mr. Berman?

THE WITNESS: Yes.

THE REFEREE: Assume that the order is a little different, but that's the way it was? In other words, at this point Mr. Hemlock has the ability to draw that -- one of those three time deposits?

THE WITNESS: And only one, and in the approximate amount of $215,000.

THE REFEREE: I follow you. Then that is the extent to which the bank was willing to let you draw on the $361,000?

THE WITNESS: Right.

THE REFEREE: Will you proceed from there? I hope I haven't mixed you up.

THE WITNESS: No. Now, a check is drawn. I drew a check on instructions from Mr. Hemlock to Miss Comeau for $200,000 that she took and, whatever she did with it at the bank, I don't know. But, thatputs her aside.

Then, I paid, you know, after Mr. Hemlock told me what expenses to lay out, the expenses to Mr. Adessky, Mr. Solomon, the reimbursement for the plane fares, Mr. Hepburn, the formation, et cetera, which came to approximately $11,000. So therefore, approximately $211,000 or so was expended from the check book -- from the account, from that check. The balance, although not collected or usable, you know, it was I guess, here they would call it uncollected funds of about $150,000 was put into two time deposit accounts in the name of Splindian Investments, Ltd.

In other words, there was a time deposit account set up called Splindian Investments, Ltd. time deposit account A and Splindian Investments, Ltd. time deposit account B. The amount was equally split so there was about $75,000 in each of these two time deposit accounts.

THE REFEREE: Who could draw on those?

THE WITNESS: Each of these time deposit accounts had one signator. The only one able to draw, the only one able to negotiate, the only one able to transact with regard to that particular

account, on one was Mr. Hemlock who was the sole signator and on the other, Mr. Berman was the sole signator.

THE REFEREE: Who arranged for this type of setup; who directed that this be done?

THE WITNESS: Mr Hemlock did, in the bank.

THE REFEREE: I am merely asking you.

THE WITNESS: Forgive me.

THE REFEREE: You know all these things but we don't.

THE WITNESS: And that's what happened to that balance. Now, of course, it was not subject to use until the check cleared, you know, but the bank was satisfied because the money that they were expending immediately from their bank was covered by a time deposit account already in existence and which was already cleared with funds.

THE REFEREE: Do I understand you correctly then, that Mr. Hemlock told the bank that they might hold, in effect as security, the account in Columbia which had been put in his name?

THE WITNESS: Yes.

THE REFEREE: Of which he had the drawing

power?

THE WITNESS: Yes.

THE REFEREE: And that's why it was safe for them to pay out these checks you were going to draw against the $361,000?

THE WITNESS: Yes, sir.

THE REFEREE: All right. Iunderstand, I think.

THE WITNESS: Now, these time deposit accounts were open. While we were there, Mr. Solomon gave Mr. Hemlock a copy of the deed which he, I believe, had prepared simultaneously with the closing so that Mr. Hemlock could take it back and see that Mrs. Leon got it.

THE REFEREE: This is a copy, isn't it?

THE WITNESS: A certified copy. You know, there is only one original.

THE REFEREE: And he has to keep it?

THE WITNESS: He has to keep it. He files a certified copy with the Registrar in Montreal and another copy was given to Mr. --

THE REFEREE: In other words, under their law the original has to remain with the Notary?

THE WITNESS: Yes, sir.

THE REFEREE: And he can give you a certified copy of it?

THE WITNESS: Yes, sir.

THE REFEREE: And that's what he did in this case?

THE WITNESS: Yes, sir.

THE REFEREE: Gave it to Mr. Hemlock to transmit to Mrs. Leon; is that it?

THE WITNESS: Yes.

THE REFEREE: All right, simple.

THE WITNESS: And then he came back to New York.

Q Can you tell us why Mr. Kay, who was the vendor on the first transaction, was present on the second transaction where there was a different vendor?

A I was told that he was the broker involved.

THE REFEREE: Who told you?

THE WITNESS: I don't remember who told me. I don't remember whether it was Mr. Solomon or Mr. Adessky or Mr. Hemlock or Mr. Kay but I was told that he was the broker.

THE REFEREE: And yet he was the nominal vendor?

THE WITNESS: No, sir.

THE REFEREE: I am wrong about that? I

understand. I misspoke myself, I realize that.

Q Did that conclude everything with respect to --

THE REFEREE: Well now, wait a minute. He was the vendor to Columbia on the first transaction.

THE WITNESS: To Columbia, yes.

THE REFEREE: Although he is only an agent for somebody in doing that or a broker for somebody?

THE WITNESS: And when Columbia -- let me go back to explain something that happened on January 11. May I refer to these transactions as the first and second transaction?

THE REFEREE: Yes.

THE WITNESS: In the first transaction Kay is the seller, the owner and seller of a piece of property.

THE REFEREE: Yes, he had bought it from Hori.

THE WITNESS: That I never had any knowledge of until the District Court.

THE REFEREE: In any event, he turns up as the seller to Columbia?

THE WITNESS: Yes.

THE REFEREE: And you are saying that he was not in fact the owner of the property he was selling?

THE WITNESS: No, he was.

THE REFEREE: You just told us he was a broker. Did I get that wrong?

THE WITNESS: Yes.

THE REFEREE: Straighten me out on it.

THE WITNESS: Two transactions. Transaction number 1, Kay is the seller of that property to Columbia. Transaction number 2, Comeau is the seller to Splindian. In transaction number 2 where Comeau is the seller, Kay is the broker.

THE REFEREE: All right, I understand now.

Q Did anything further occur?

A No, I think that was about it, and we went home.

Q With regard to either one of these transactions, in 1968 or at any time, did you receive any part of any of the proceeds which were realized from the transfer of title?

A No, sir, not one cent.

Q Did you ever receive any form of consideration from anyone for the services that you rendered at the request of Mr. Hemlock?

A Other than my salary, no.

Q Did there come a time thereafter, sometime in

April of 1968, that you were requested by Mr. Hemlock to prepare certain governmental forms?

A Yes, sir.

Q Would you tell us about that?

A Yes. Mr. Hemlock informed me that he had been informed by his accountant that there was --

MR. COHEN: Can we fix a time?

THE WITNESS: In April, I can't give you a date.

Q Approximately?

A Approximately April of 1968, about two months after the second transaction, that the government had -- the United States Government had promulgated regulations or laws which required any person who had any interest, whether it be stock ownership, directorship or officership in any foreign corporation to file an information return with the United States Government.

And, I was directed to get the forms and to prepare such forms for filing with the government.

THE REFEREE: Who directed you?

THE WITNESS: Mr. Hemlock directed me.

THE REFEREE: Will you please, in each case, tell us who directed you?

THE WITNESS: Mr. Hemlock directed me to prepare,

to get the forms and to prepare these forms, which I did. And they were signed by the appropriate parties. When I say "the appropriate parties", the stockholders sign I think in one place and the officers sign in another place. So, I signed as assistant secretary in the officer box, along with the other officers who were United States citizens. And the stockholders, Hemlock, Berman and Frank, signed also in the box for stockholders. And these forms were mailed out to the United States Government in April of 1968.

Q Were forms prepared with respect to the two corporations, Splindian Investments, Ltd. as well as Columbia Corporation, Ltd.?

A Yes, sir.

Q Did you prepare these forms pursuant to the direction of Mr. Hemlock?

A Yes, sir.

Q I show you a United States information return, form number 959, and ask you was that a copy, an exact copy of the form that you prepared at the direction of Mr. Hemlock on behalf of Columbia Corporation, Ltd.?

A Yes, sir.

she allegedly made these remarks?

A I never heard these remarks.

Q That you heard?

A I never heard such a conversation.

THE REFEREE: May I ask you at this time, were you asked during the Federal trial the same questions, in effect as Mr. McGillicuddy has just put to you?

THE WITNESS: Your Honor, the --

THE REFEREE: Won't you answer me?

THE WITNESS: Yes.

THE REFEREE: You were?

THE WITNESS: No, no. I was advised not to take the stand and stupidly I did not.

THE REFEREE: You have told us that already.

THE WITNESS: So I was never asked these questions.

THE REFEREE: I understand that, that you didn't give any testimony.

THE WITNESS: I was never asked questions.

Q Do you recall Mr. Latvis' testimony in the trial of the criminal case where he referred, in substance, to the principals who broke the time deposit

and at one point he identified them as being members of a firm, one being Hemlock and one being Hoffer? Do you recall him in substance testifying to that?

A Yes, I do.

Q Were you in fact a principal in one of the accounts whereby you did or could have broken the time deposits?

A No.

THE REFEREE: What do you suppose he meant by "principal"?

MR. McGILLICUDDY: It was very confusing to me. I only could draw the conclusion, when he used the word "principal" he used it in relation to having a beneficial interest in one of these accounts.

THE REFEREE: Will you read the question again in the record?

MR. McGILLICUDDY: Yes.

MR. COHEN: What page are you on?

MR. McGILLICUDDY: This is 642-A.

THE REFEREE: Unfortunately, Mr. McGillicuddy, my notes are coded to the typewritten record and consequently I can't locate them.

MR. McGILLICUDDY: This is 506, I should give you the other number. Latvis direct is on 506 of the typed transcript.

THE REFEREE: Yes.

MR. McGILLICUDDY: He talks about the large sum of money being broken. The question is at page 505:

"Q And, what happened when you broke the time deposit?

"A Then they requested us to pay out, and we paid out.

"Q In what form?

"A We paid out in cash.

"Q Do you recall approximately how much cash you paid out?

"A The amount is not clear in my mind but it was a large amount perhaps from $300 to $600,000; $300,000 to $600,000. I can't say definitely what the amount was because I had no record.

"Q Do you have any memorandum with respect to having done an investigation with respect to the principals that you refer to?

"A Yes.

"Q Did you conduct an investigation on the account?

"A Yes. It is customary for any officer of the bank -- we conducted an investigation. I called the New York branch given as a reference branch where the principals were doing business and the result was a favorable recommendation and the two principals that I dealt with are associated with a legal firm in New York City.

"Q Do you recall the name of that firm?

"A Hemlock, Hoffer, I think it is Becker. I looked up Becker today in the telephone book, but I know it was a legal firm practicing legal firm in New York City plus the branch's recommedations led me to or induced me to open the time deposit."

THE REFEREE: I have that right in front of me. Do you think he meant by that "principals" those who were entitled to draw against the account as Mr. Hoffer has explained to us?

MR. McGILLICUDDY: That was the -- I thought that was an inference that could be drawn and that is why I have asked the question here relating to

that.

I will agree there is an ambiguity there but I think someone may argue that that is a fair inference to draw, which Mr. --

THE REFEREE: All he said was that some of the principals, as I recall it, were connected with another account or two. So we are dealing now with the whole of these -- all these transactions. And in those, principals, correlate to the people who were invested with the power to draw after the breakup of the checks; isn't that positive?

MR. McGILLICUDDY: That's right. But then immediately he said, "Did you conduct an investigation on these principals?" He says, "Yes, Hemlock and Hoffer."

THE REFEREE: "And I think Becker."

MR. McGILLICUDDY: Well, he said Becker was associated with the firm.

THE REFEREE: He says at page 507, "The principals were associated with Hemlock and Hoffer and I think Becker."

Q Do you recall that testimony of Mr. Latvis?

A Yes, sir.

Q Were you in anyway, at any time, a principal with respect to any accounts that were opened in the Bahamas whereby you could assert any control or have any beneficial interest therein?

A Other than the checking accounts to which I testified to, which the money was transferred out of, I had no interest whatsoever. I could not draw any money. I did not draw any money and I received not one cent of money.

THE REFEREE: But you have told us and it was a fact that there was a period during which you had accounts on which you could draw?

THE WITNESS: When you say --

THE REFEREE: The bank man who testified here, Mr. Hoffer, that is Mr. Latvis, he doesn't know about your arrangements with Mr. Hemlock and the other parties. All he knows about there was a time when there were accounts on which you had the right to draw; isn't that true?

THE WITNESS: Yes, but I must say when you say a period that I had the right to draw, that is not true.

THE REFEREE: A time.

THE WITNESS: That is not true either for this reason. When the money was deposited into an account, simultaneous with that deposit, transfers were made, over the expenses and the cost of the land, to time deposit accounts.

THE REFEREE: I realize that. But, until that was done, you had the right to draw, didn't you? What I am getting at is that Mr. Latvis or whatever his name was, quite accurately and, what he could have been referring to was the fact that there was a short point in time which you did have the right to draw checks. He was correct about that, wasn't he?

THE WITNESS: The right to draw checks, yes.

THE REFEREE: That's all he said.

Q Did you also, referring to page 707-A, which is 571 of the stenographer's minutes, do you recall the testimony of Miss Reilly relative to her flying to New York in order to expedite the clearance of the check?

A Yes,sir.

Q Do you recall her testimony in substance when she was asked, "Who financed the trip?" And her answer

was, "Mr. Hoffer and Mr. Hemlock. I can't really tell you who actually handed me the ticket or the spending money."

Do you recall that?

A Yes, I remember that testimony.

Q At the time that you were in the Bahamas, who was the one that gave her that assignment and who gave her the plane ticket and who gave her the expense money?

A Mr. Hemlock.

Q Did there come a time in June, 1969 at which time Mrs. Dominguez retained a firm of attorneys here in New York?

A Yes.

Q Or about that time?

A Yes.

Q Was that the firm of Morrison, Paul, Stillman & Beiley?

A Yes.

Q Did that firm represent her with respect to the transactions which you have been testifying about here?

A No.

Q Did the firm institute a civil suit relating

and with the expenses, I'll get you a check for approximately what we had considered the expenses to be."

And at that time I told him that the people in Canada wanted some advance money; that there was no contract which I had signed in any way with Mr. Kay, and that the people in Canada weren't going to go down on a fool's errand to the Bahamas unless there was some money sent to Canada.

At that time Mr. Hoffer was in the Bahamas. Mr. Frank gave me $5,000, which I wired down to Mr. Hoffer and asked him to deposit in a corporate account, which I asked him to set up in the First National City Bank in the Bahamas in the name of the purchaser, the purchaser who would ultimately sell to Plainvest, and that purchaser was Columbia Corporation, and the stock was to be held by -- and I instructed Mr. Hoffer, equally one-third Mr. Frank, Mr. Berman and myself, with two shares, because Mr. Hoffer explained to me that Mr. Hepburn had told him about Bahamian law, had to be held by Bahamian authorities, and it was customary because anything that had to be done with filings or anything down there was normally done by the Bahamian lawyers, the firm of Peter Graham.

So there were two shares held, one by a Mrs. or a Miss Cecelia Neill, N-e-i-l-l, I believe it is, and one by Mr. Anthony Hepburn.

Q Did you give Mr. Hoffer any instructions about how many corporations were to be formed in the Bahamas?

A Yes. After Mr. Frank told me about this, I argued with Mr. Frank that I should get my full fee, and Mr. Frank persuaded me that there would be a substantial paid to all of us, and that the following payment by the same method would be sufficient to pay all three of us, and with this I told Mr. Hoffer to acquire two corporations, and Mr. Hoffer acquired the corporation Splindian Investment, Ltd.

THE REFEREE: Why do you need two?

THE WITNESS: Because we weren't getting the full amount of money, and if there was going to be another transaction, and I didn't know when it was going to be at that time, he told me that money would be freed up. I didn't know if it was a week, a month or a year. I didn't want to in any way have another corporation -- I didn't want in any

way have a corporation in which I would not -- would I lose control over.

In other words, if I felt like taking my one-third out, I didn't want it to be part of anything else that occurred thereafter.

THE REFEREE: How soon did you learn that there was to be a second transaction? By second I don't mean two within the one. I am talking now about the Comeau --

THE WITNESS: Miss Comeau, C-o-m-e-a-u.

THE REFEREE: How soon after you knew about the first transaction, which I will call Sherbrooke, did you know there was going to be another one?

THE WITNESS: I didn't know it until about two weeks after I returned from the Bahamas and the first transaction.

THE REFEREE: Couldn't you have used Columbia for both of them?

THE WITNESS: Yes, but I didn't know when I was going to get the money and I thought I might draw my money out, or whatever I was going to do, I didn't want to be held with any

control other than the limited control which I had being a signature. I wanted -- I didn't want to be involved with Berman and Frank in any other -- in any loss of control on the first corporation.

I made it understood to Frank if I wanted to draw my money out, I would draw it out. And anything, any additional moneys that I was to get and he was to get and Berman was to get, would be completely distinct, and the arrangement we made was to have a corporate account which Mr. Hoffer would be able to initially open, and thereafter three separate corporate accounts, called Columbia 1, Columbia 2 and Columbia 3. Each one -- only one had the signature, and by the by-laws no one else could draw on that account. So we each had ultimate unlimited authority to do what we wanted to do with that one-third.

I went a little ahead of myself.

Q After you wired Mr. Hoffer the $5,000, what was the next occurrence?

A I instructed Mr. Hoffer to wire this money to Mr.

Kay in Montreal. And through telephonic communication with Mr. Kay I arranged to meet -- and that money was to be used as earnest or good faith money and towards expenses which I had agreed, and I had approval from Mr. Frank to pay the Canadians for their expenses.

That would be the transportation, Mr. Solomon's fee, the notary, I think it was $2,250 -- no, that was Addesky's fee, I think. I don't remember what Solomon's fee was. And their transportation.

And they were to take it out of the $5,000, and it was arranged that they would fly down from Montreal, Canada, meet me in New York, continue on to the Bahamas, because I believe there were no direct flights from Montreal to the Bahamas, but there was a direct flight twice or three times a week from New York to Nassau, Bahamas, and that is the manner in which we went to the Bahamas.

THE REFEREE: Mr. Hemlock, if this offshore transaction was for the benefit of Kay and his tax situation, why should you pay his expenses of going down to Nassau to close there?

THE WITNESS: Well, I argued with Kay.

We had reached $105,000. I knew that it was a benefit to Mr. Frank, Mr. Berman and myself, and I had knocked him down 10,000 in the price, and I frankly was very, very anxious to have this go through, and when Mr. Frank gave me the approval that we could defray the expenses, I was very happy.

At this time, months had gone by and I had gotten a dime of my fee for my work in Spain, aside from the expenses of that mission.

I asked Mr. Kay and Mr. Solomon and Mr. Addesky to meet me in New York. That was January 10th, the day before the closing in Nassau, Bahamas. And on that day, I don't recall what time it was, but I met them at the airport and we all continued to go in a direct flight from New York to Nassau, Bahamas.

We arrived in the Bahamas and I had contacted Mr. Hoffer and told him what time we would arrive, and Mr. Hoffer, and I believe Mrs. Hoffer, picked us up at the airport. They had gotten us reservations I think in the Emerald Beach Hotel in Nassau, the Bahamas,

and we got down there late in the day, I think it was late in the afternoon or early evening, and the arrangements which I had with Mr. Frank were that a representative of Planinvest would appear in the Bahamas, a Mr. Lefkowitz, and he would have with him a certified check from Planinvest for the sum of $778,500, and he would also have a corporate resolution for Planinvest to enter this purchase.

And I knew that I would need a corporate resolution because that was told to me by either Mr. Addesky or Mr. Solomon on the 11th --

THE REFEREE: I understood you to say a little while ago that Planinvest was not competent to take the property?

THE WITNESS: I never said that, Judge.

MR. KOENIG: The statement was that Planinvest wasn't competent to pay an obligation of an officer.

THE WITNESS: I don't believe I said that, your Honor.

THE REFEREE: I'm sorry. What you said was they would not be competent to pay a debt

of Mrs. Leon.

THE WITNESS: Yes. I don't think I said that, your Honor.

MR. KOENIG: Yes, you did.

THE WITNESS: I don't think I said anything about not competent to buy property.

THE REFEREE: I got the names mixed.

THE WITNESS: As a matter of fact, if your Honor pleases, they were competent to be involved in the purchase of land and a house in Forest Hills Gardens through the New York corporation. Planinvest pledged stock for the purchase of her house at Forest Hills.

THE REFEREE: You are quite right. I didn't recall. What you said was that Planinvest could not pay a debt of Mrs. Leon's.

THE WITNESS: Yes, your Honor.

I think I was up to the 11th, your Honor.

Q Yes.

A Mr. Hoffer had opened an account in the name of Columbia Corporation at the First National City Bank in Nassau, Bahamas. And Mr. Hoffer had deposited the money I had wired down to him to open the account,

and I think he had left a hundred dollars there to keep the account alive and wired the balance to Mr. Kay in Montreal.

He had also reserved using the services of Peter Graham, and in particular the attorney, Anthony Hepburn, from Mr. Graham's firm, who were familiar with the First National City Bank in the Bahamas, and he was able to reserve the board room for the closing at that time.

THE REFEREE: As I understand, there had been no contract, written contract, for the purchase of this property; had there?

THE WITNESS: No, sir.

As a matter of fact, I later found out -- I did not know at this time -- that Mr. Kay was not even the owner at the time that he was negotiating with me. Mr. Kay -- Can I continue, Judge?

THE REFEREE: Yes, go ahead.

THE WITNESS: Mr. Kay had apparently got an option from the true owner. In other words, when I went to Montreal, Mr. Kay didn't own this fee. He got an option from the owner, and he

had that option with him, so not only was it a back-to-back transaction with me, it was an option type transaction with a Mr. Hori, who was the original owner.

So at that time there was no contract of any kind with Mr. Kay. That is why Mr. Kay wanted the $5,000.

THE REFEREE: In the meantime, though, you gave him $5,000, without any contract obligation by him to sell?

THE WITNESS: That's correct.

Q You stated that the board room at the bank had been secured for the purpose of the closing?

A Yes.

Q Who was present at the closing?

A At the closing, which I think was conducted about ten or eleven o'clock in the morning, present was myself, Mr. Hoffer, Mr. Anthony Hepburn, the Bahamian lawyer, Mrs. Cecelia Neill, his secretary, Mr. Arthur Kay, the vendor of the property, Mr. Ellie Solomoni, the notary, and Mr. Addesky, who was Mr. Kay's attorney.

Q When did Mr. Lefkowitz arrive?

A The first transfer of property was a transfer of property from Mr. Kay. I hadn't known at that time that he actually only had the actually only had the option, but apparently he had paper in escrow or something which made him the owner at that time.

Mr. Kay transferred to Columbia for approximately $105,000 -- I said approximately, your Honor, because there were some credits or debits -- for $105,000, and immediately thereafter, in a back-to-back transaction, Columbia Corporation, represented by Mr. Anthony Hepburn conveyed to Planinvest for the sum of $778,500, and at that closing Mr. Lefkowitz appeared and appeared with a check from Planinvest, which was signed by Mrs. Leon and certified by her bank here in New York, the Bank of London and South America on William Street, I think it was 78 William or something like that, and he signed the deed, which is required as grantee, Mr. Lefkowitz.

THE REFEREE: Was Mr. Solomon there?

THE WITNESS: Yes, he was. Mr. Solomon --

THEREFEREE: Whom did he represent?

THE WITNESS: He was the notary. Anytime there is a transfer of Canadian property offshore there must be a Canadian notary. Otherwise it is not valid. He had to take the first deed, which was the deed from --

THE REFEREE: Hori to Kay?

THE WITNESS: Yes, sir, and from Kay to Columbia, and from Columbia to Planinvest. And my understanding was that he keeps these original deeds but files a certified copy with what is tantamount or equivalent to our County Clerk's Office here in New York.

THE REFEREE: Whom does he represent as between buyer and seller? Whom did Solomon represent?

THE WITNESS: I would say he represented everybody as a notary there for the efficacy of the validity of these transfers.

THE REFEREE: Who employed him?

THE WITNESS: We paid his fee, one fee, but in each instance he took care of the notarial work for each transfer, but his fee was paid by Columbia.

I had agreed with Mr. Kay -- Mr. Frank had given me that authority, that we would pay Solomon's fee, Addesky's fee, and the transportation of Kay.

At the conclusion of these two closings, really three when you consider Hori and Kay, and I did not know of the Hori-Kay situation. Kay was the vendor, and Solomon was there frankly to certify title .

At the conclusion of these transfers, we went downstairs. The board room -- it's a very small hotel -- small bank in Nassau. It's a very old wooden frame bank and it's very lovely. Upstairs was the board room and we went downstairs to the main lobby, so to speak, of the bank. And there Mr. Hoffer introduced me to Mr. Latvis. Mr. Latvis was the manager of the First National City Bank in Nassau, the Bahamas, and Mr. Latvis had met Mr. Hoffer opened the bank account for Columbia on my instructions, and had further been in contact with Mr. Hepburn, and Mr. Latvis, making preparation for the use of that room. It was the

bank's facility.

We went downstairs and at that time I intended to pay Mr. Kay by good funds, because we all went downstairs, and the $778,500 check was a certified check on a New York bank, and that was deposited in the Columbia account.

And Mr. Kay at that time -- there was no contract or anything. He wanted it in good funds. So he wanted a certified check or a bank check from the First National City Bank, Bahamas, for the payment of his closing costs, which was the cost of the land plus some credits which amounted to a thousand or $2,000 that Mr. Hepburn had worked out on the closing.

And Mr. Latvis said that was not possible, even though the check was certified. And I asked Mr. Latvis at that time, would he call the bank in New York to certify that this is a bona fide check, that they certify it, and he did so and found out that the check was bona fide certified and was Mrs. Leon's signature, and had apparently been approved by Mrs. Leon, but he could not transfer it because he said,

"The check has to pass through the Federal Reserve in New York. Anybody could even put a stop on it, even though it is certified. I don't wan t to get involved in a lawsuit."

So Mr. Kay was not happy and would not close under those circumstances. Even though we said we would give Mr. Kay a postdated check, postdated a couple of days later, to clear, until our check cleared.

We learned that it would be five to eight days, or maybe more, before that certified check would clear. I asked Mr. Latvis if there was any other way of expediting -- if there is any way of expediting this in any manner or form, and Mr. Latvis told me that he would accept -- he would expedite it if a messenger of the bank personally took that check, which was deposited in the Columbia account, and stamped for deposit to Columbia, on the Columbia account, that it was deposited, if someone from the bank -- he wouldn't let us do it -- if someone in the bank took it, would go up to New York and clear and then call him, he would be satisfied that it

cleared; that the delay of eight days was the sending of the check up by pouch.

It only goes up to the Bahamas, I understand, only two days a week, not every day, and then it clears, goes through the procedure in New York, and so on.

And I said -- by the way, this was all being done in the main floor at the desk of Mr. Latvis, and right next to his desk was Miss or Mrs. -- I think it was Miss Betty Reilly, his secretary, his personal secretary of the bank. And she had been listening as part -- it was right openly done, and she had been listening, and he turned to Betty and he said to her, "Well, what do you think? Would you want to go to New York?"

And she was just delighted to go. She had family here in New York, and I said that Columbia would pay all of the expenses. I gave her $100 in cash for expenses. That would be for cab fare and lunch and anything else. I didn't figure it out.

I said, "When you get there, take a cab

from the airport." And I gave her money for a first class ticket from Nassau, Bahamas and back, and it was right there in front of Mr. Latvis, who was told to -- it was asked of Mr. Latvis if she could stay up there a couple of days and Mr. Latvis said, "Go ahead," she had some vacation time.

I frankly didn't get involved in that, and she took this assignment and went up.

And we all agreed to stay, including the notary, which increased his fee. I don't remember what his fee was originally, but he added another day's pay.

And the following day she flew right up and the following day we got a call from her. I shouldn't say "we got a call." Mr. Latvis got a call and then Mr. Latvis -- Mr. Kay then didn't want a Columbia check. Mr. Kay wanted a bank check. And Mr. Latvis had a check drawn then on my authority as signature for Columbia.

At that time, Mr. Hoffer had opened that first account, and I had told Mr. Latvis at

that time to prepare the papers to open three individual corporate accounts, and he had said to me that "It's kind of foolish to leave all that money in a corporate account. You are not going to get any interest or income. It's a lot of money."

And I said, "How about three corporate time deposit accounts?"

And he said that would be perfectly fine. He was showing me how he could get four or five per cent interest during any period of time from the day of deposit to the date of withdrawal. And I said fine.

And at that time, Mrs. -- Miss or Mrs. Reilly called Mr. Latvis. It cleared and Mr. Kay was given a bank check, not one of the checks of Columbia, but a bank check charged to the Columbia account on my signature. I signed some form for them to withdraw that from the Columbia account and pay by bank check. I think there was even a dollar and a half charge or something for a bank check rather than a corporation check from the checkbook.

It was paid to Mr. Kay. Mr. Hoffer, at my direction, then issued checks from the Columbia account. There was a small check-- it wasn't even a regular checking account because they made a fast book up, and it was small. It looked like a housewife's account, so to speak. Mr. Hoffer made all the checks up and paid Mr. Addesky his fee, Mr. Kay for transportation and hotel, Mr. Solomon --

I neglected to say, your Honor, Mr. Hebert came down with Mr. Kay and I met him at the airport. I forgot that was another party who was there. I didn't know he was coming. I didn't know what his function was. But when we paid the expenses, we even paid the expenses of Mr. Hebert.

I had Mr. Hoffer issue a check for all these expenses. Of course, the 5,000 sent to them was deducted as against the closing fees.

At that time, they -- meaning Mr. Addesky, Mr. Hebert, Mr. Kay wanted to stay another day in the Bahamas. It was a sunny day. That day, the day that the closing was originally to be

concluded, the 12th, was raining. They said that they wanted to get a little sun and they wanted to shoot some craps in the casino at Paradise Island. The casino had just opened a couple of months before, gambling in the Bahamas. The casino was right over the bridge from Nassau to the Bahamas ten minutes, and they said they wanted to shoot dice, and they wanted to get a day's sun.

And at that time I was interested, from instructions of Mr. Frank, to bring back a deed. He wanted Mrs. Leon to have the deed immediately, and I asked -- I told Mr. Solomon about that immediately when I had spoken with him by telephone and when I met him in New York on our way down to the Bahamas when he was with the group, the Kay group, with Hebert and Addesky, and Mr. Solomon had brought along extra deeds with blanks in them, one of them, so he could certify, write it in and certify it, so that there would be one ready.

He said he had to get one ready and that if I would meet him, or have someone meet him

when he flew up to New York, that he would hand deliver the deed to us at the airport.

He didn't give me the deed on the 13th. There were some changes that he had to make in the deed and write in the resolution or corporate minutes which was brought by Mr. Addesky, which was all written in the deed, and he on the 13th -- Mr. Hoffer and I flew back on the 13th.

I believe it was on the 14th that Mr. Solomon came up to New York. He had called me from the Bahamas and I asked Mr. Hoffer to go out to the airport and pick up the certified deed, so I could give it to Mr. Frank.

And Mr. Hoffer did go to the airport and he did receive from Mr. Solomon a certified copy, which Solomon wrote out and certified in the Bahamas, and gave to Mr. Hoffer, who gave it to me and I gave it to Mr. Frank to be given to Mrs. Leon.

Q Does that conclude that entire transaction?

A Well, in the Bahamas, during the transaction, Mr. Addesky and Mr. Solomon raised the point of receiving

some of the incorporated by-laws of Planinvest because they had to have that for some reason, or they desired to have it, to indicate that Planinvest had the right to purchase land.

And I told him that I would obtain those for him, and I called up Mr. Frank, and Mr. Frank obtained them and I gave them to Mr. Hoffer. Either I or Mr. Hoffer forwarded them.

MR. COHEN: When you say "them" --

THE WITNESS: These papers that he wanted. They were in French, the ones that I received from Mr. Frank, they were -- they were kind of -- they were by-laws which indicated the powers of a Luxembourg corporation to transact business in other countries.

Q You said they were in French?

A They were in French. And, by the way, Mr. Solomon and Mr. Addesky dealt in French all the time in Canada. In the area that they practiced, they did a lot of -- there was a lot of documents in French.

THE REFEREE: Do you want a five-minute recess now?

THE WITNESS: Yes, your Honor.

(Recess taken. After recess, hearing continued.)

BY MR. KOENIG:

Q There were three time deposits?

A There were three time deposit accounts established in the First National City Bank. In each account it was under the name of Columbia Corporation Account 1, Columbia 2 and Columbia 3.

Columbia 1 had the name of Alfred J. Hemlock, Columbia 2 Frank, and Columbia 3 Berman. I don't know if they had those numbers.

THE REFEREE: Those were the only people who could sign on them?

THE WITNESS: The only one who could sign on them.

There was left in the general disbursement account, the account that Mr. Hoffer had opened, almost no funds, maybe $50 or $100. I don't remember what the amount was. And in each of the time deposit accounts, they were set up in the sum of $215,000 each, a total of $645,000.

There was some money left in the Columbia expense account. I don't know. It wasn't much.

That was a disbursement account Mr. Hoffer had the right to sign on, and when I went down I had the right to sign on it also.

Mr. Frank and Mr. Berman did not appear down there. I asked Mr. Latvis to open these accounts, and he told me they would need signature cards. He would get it all set, and he gave me the signature cards which I turned over to Mr. Frank and Mr. Frank returned them with Berman's and his signature a day or two later, and I mailed them down back to the bank in Nassau, Bahamas.

But Mr. Latvis told me they would get interest from the first day, just like my account which I had signed for when I was down there.

Q What was the next occurrence?

A After -- a couple of days later, a day or so later, I turned over the deed which had been turned over to Mr. Hoffer and then was turned over to me, the deed to Planinvest, duly executed by Mr. Hebert Lefkowitz, and nothing happened except that when I turned it over to Frank, I asked Frank, "When am I going to get the balance of my moneys?" And at that time there was owed to me

by one of the men who was going to be in on the divvy that it was agreeable to her, did you not?

THE WITNESS: Yes, your Honor.

THE REFEREE: And you felt that was sufficient?

THE WITNESS: Yes, your Honor.

THE REFEREE: And you still think so?

THE WITNESS: I would prefer now that I had a statement from her, yes.

THE REFEREE: When you told Mr. Hoffer about the fee, did you tell him the amount in dollars that you were to get?

THE WITNESS: I initially told him that I was going to get an enormous fee. Thereafter I told him I was going to get a fee of a million dollars to be split between Mr. Frank, Mr. Berman and myself.

THE REFEREE: And when did you tell him that?

THE WITNESS: After I came back from Spain, some time thereafter.

THE REFEREE: Mr. Hemlock, I find in the testimony in the record in the Federal Court -- I have tried to make a note of every reference

therein to you, and I shall not go over all of them because most of them you have disposed of in your testimony here, that is to say, your version of the things that were stated by Mrs. Dominguez and the others in reference to things which you did or said. I think you have covered virtually all of them in your testimony, but there are one or two that I would like to ask you about because perhaps you ought to have an opportunity to put your explanation of them on the record.

THE WITNESS: Yes, your Honor.

THE REFEREE: Let me say before I ask that. Did you participate in the conference that Mr. Hoffer had with his trial lawyer on the question of whether or not he should take the stand?

THE WITNESS: Yes, your Honor. It was a joint conference. As well as my attorney was present, Mr. --

THE REFEREE: I was coming to that.

THE WITNESS: I'm sorry, Judge.

THE REFEREE: So that there was a conference

at which you were present, Mr. Hoffer was present, your trial counsel --

THE WITNESS: Mr. Michael Direnzo.

THE REFEREE: And Mr. Hoffer's trial counsel. How about counsel for the other defendants, were they all present?

THE WITNESS: I don't know whether they right in the conference, but I think they were aware of what was going on. Everybody was asked-- whether it was all one mutual conference I can't say. It was in the corridor of the courtroom, and it spilled into Gasner's restaurant at that time, and was during these cross-conversations, but I know at one conference Mr. Direnzo, myself, Mr. Hoffer, and Mr. LaRossa were present.

THE REFEREE: Will you tell me your recollection of that conversation in so far as it relates to the question whether or not you should take the stand.

THE WITNESS: Yes. We, I particularly and the others, were kind of shocked when Mr. McDonald rested his case abruptly that morning.

THE REFEREE: That is the prosecutor?

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THE WITNESS: The U. S. Attorney, the prosecutor, who was representing -- U. S. Attorney. And at that time we all -- we thought that there was additional witnesses or some testimony would be put in. We felt, and I don't know -- I can't read anybody else's mind, but the consensus of opinion was that Mrs. Leon's testimony was incredible, and Mr. LaRossa spoke to Mr. Hoffer and Mr. Direnzo spoke to me, and said, "We are not very certain that she has even proved a case. Although we don't know whether the -- we don't believe the Judge is going to dismiss the case. But we think the sum and substance is insufficient as a matter of law to prove a case."

THE REFEREE: They knew pretty well he wasn't going to dismiss it because he had asked for proposals of charges; had he not?

THE WITNESS: Yes, but we anticipated to go back into the courtroom and ask for a dismissal of the charges. But it was the consensus of opinion that the testimony was not credible and no proof -- no sufficient proof was made.

And Mr. Hoffer in my presence -- and his wife was present, too. His mother happened to be there. But she wasn't in that conference. She was sitting through the trial, as well as my daughters.

Mr. LaRossa expressed to Mr. Hoffer that in his considered judgment he believed they had not proved a case, and his advice and counsel was not to go forward in so far as a defense was concerned.

And I might add --

THE REFEREE: What you are saying is that they should not take the stand and put in any defense?

THE WITNESS: Yes.

THE REFEREE: And that applied to all the defendants, did it, or just --

THE WITNESS: Yes, that was his opinion, and Mr. Direnzo and Mr. La Rossa knew that there were three or four witnesses that I had spoken to who were going to testify on my behalf, one being Mr. Blumenberg -- not on my behalf, just to testify, but in my defense.

THE REFEREE: A defense witness?

THE WITNESS: Yes. Mr. Blumenberg, and I had five or six character witnesses, and I had a couple of other witnesses, Linda Riera, who was subject to a phone call, the lady from Puerto Rico that I mentioned, who went over as an interpreter. And it was then decided that we would not put in a case.

And, frankly, your Honor, when the jury went out -- I don't mean to get into extraneous matters -- I was so confident that that jury was going to laugh Mrs. Leon out of court with her testimony. And, of course, we know the result.

THE REFEREE: Mrs. Dominguez testified -- and if you want to know where, Mr. McGillicuddy, I will tell you where in the stenographer's minutes it is so you can translate it right into the record you have before you. At page 85, she refers to the conference which took place in her house in Forest Hills Gardens, and she said that Mr. Hemlock was there and

AFTERNOON SESSION

November 12, 1974

* * *

JAMES M. LaROSSA, a witness called by Respondent Hoffer, residing at Old Mill Road, Greenwich, Connecticut, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. McGILLICUDDY:

Q Mr. LaRossa, are you an attorney?

A I am.

Q Duly admitted to practice the profession of law in the State of New York?

A I am, sir.

Q When were you so admitted?

A 1958.

Q Since 1958 up to the present time have you devoted all of your time to the practice of your profession?

A I have, sir.

Q Do you presently maintain an office in Manhattan?

A I do, sir.

Q Where is that office?

A 522 Fifth Avenue.

Q Are you a former United States Attorney?

A I am, sir.

Q What period of time did you --

THE REFEREE: You don't mean "United States Attorney."

THE WITNESS: I assumed you understood.

Q Assistant United States Attorney.

A I was appointed Assistant United States Attorney in 1961 -- I beg your pardon; 1962.

Q For what period of time did you practice as an Assistant United States Attorney and in what district?

A I practiced in the Eastern District of New York from 1962 through 1965.

THE REFEREE: You mean as an Assistant United States Attorney?

THE WITNESS: As Assistant United States Attorney.

Q As Assistant United States Attorney, were you responsible and did you handle the trial of criminal cases in the Federal District Courts?

A I did, sir.

Q After you left office in 1965 as an Assistant United States Attorney, did you pursue a particular

specialty in the field of law?

A I did, sir.

Q What is that?

A I practiced -- I represented clients in criminal matters within the Federal courts.

Q Have you continuously done that from 1965 up until the present time?

A I did, with very few exceptions. At times I represented people within the State courts but I could count those on my hand, quite frankly. I don't think more than a half dozen times.

Q Did there come a point in time when you were retained by Harry Hoffer incident to an indictment which was returned in the Southern District here in New York?

A Yes, sir.

Q Did you appear for him as a result of that indictment as his trial counsel?

A I did, sir.

Q Did there come a point in time when the matter was moved for trial before Mr. Justice Pollack and a jury?

A Yes, sir.

Q Were you his counsel during that period

A I was. I represented Mr. Hoffer throughout the trial.

Q After the Government had presented their case, did you have a conversation with Mr. Hoffer regarding whether or not he should testify?

A May I assume, since Mr. Hoffer is present, that he wishes me to answer this question and waive any privilege with respect to conversations he and I had.

MR. McGILLICUDDY: Do you, Mr. Hoffer?

MR. HOFFER: Yes, sir, I do.

A (Continued) Yes, I did have such conversations.

Q Will you relate the substance of the conversations you had with him?

A My recollection of the occurence was that the Government had just rested, and rested a day or so before we anticipated their finishing the case.

The issue before us was whether we were going to present a defense or not.

I strongly recommended to Mr. Hoffer that he not take the stand in his own defense for a number of reasons.

The first is I had very serious doubts about whether his implication within the cinspiracy had

been proved to a legal satisfaction.

In addition to that, I believed that even if the judge did send the case to the jury, the jury would have difficulty in believing the testimony of the complainant.

The third reason is that Mr. Hoffer was, in my opinion, a nervous individual, and based upon his nervousness, I did not think that he would be presented to a jury in as good a fashion as he did when he was having a conversation with two or three individuals.

For those reasons I strongly suggested that Mr. Hoffer not take the stand in his own defense.

THE REFEREE: Were these the reasons in your mind, Mr. LaRossa, or did you disclose them to Mr. Hoffer?

THE WITNESS: Not only were they in my mind, sir, but I disclosed them to Mr. Hoffer.

As a matter of fact, we discussed them as extensively as we could before we made a determination on whether or not to go forward or not.

Mr. Hoffer had anticipated testifying up to that point. We had discussed his testimony,

naturally. And he agreed with my recommendation based upon the fact that he believed my experience should decide the issue, I assume.

THE REFEREE: Did he have a preferance of his own, apart from your view; did he express any preference of his own?

THE WITNESS: Yes, sir. My recollection is that at one point, and I think at that point he did wish to testify as to the events. But, again, unfortunately, I thought the case was going to wind up differently.

I gave him my suggestions as strong as I could and I assumed he followed them based upon the fact that he thought my experience and expertise should be the deciding factor in the case.

MR. McGILLICUDDY: I have nothing further.

MR. KOENIG: I have no cross examination.

CROSS EXAMINATION

BY MR. COHEN:

Q Mr. LaRossa, did you confer with your co-counsel in connection with the strategy of this case?

A Yes, sir.

Q Did you discuss then the advisability of Mr. Hoffer testifying?

A Do you mean on the day, sir, that we decided not to put him forward?

Q Whenever you did.

A You have to understand that you are talking about many, many conversations.

At one point, yes, there was an assumption that he would take the stand.

Q I am talking about at the time that there was a decision for his not taking the stand prior to your coming to that determination, did you discuss with your co-counsel the advisability of Mr. Hoffer not taking the stand?

THE REFEREE: Excuse me a minute.

Are you suggesting that Mr. LaRossa had co-counsel on behalf of Mr. Hoffer?

MR. COHEN: I am talking about other counsel in the case.

A I am quite sure that I did have conversations with them. Not about the advisability of whether he was going to take the stand or not.

Q That is my question, sir.

A Do you mean did I seek their advice?

Q I didn't ask you that.

I asked you whether you discussed with them your decision and the advisability of Mr. Hoffer not taking the stand?

A I certainly gave them my decision.

Does that answer your question?

Q Did you discuss it with them?

A I am sure I did.

Q Was there any badinage or any conversation relevant to your decision?

A I don't believe so. Although I am absolutely not certain. I am sure there were a number of times that that was discussed.

Q At what point did you have this discussion?

Was it after, at the end of the Government's case?

A It most probably began before that. I think we received some advance notice during the day that we made our determination, that the Government was about to rest, and I think we based that upon the fact that we received no further Jenk's Act material or what we call 3500 material of other witnesses and I possibly said to Mr. MacDonald, "Who is next? Or are we getting any further statements?"

And he at that point in the proceeding informed us, "We are about to rest." I must assume, sir, that at that point we started our discussion. I know that it spilled over during lunch. I assume that lunch was consumed with the idea of what we were going to do, whether we were going to go forward. I honestly don't recall anyone strongly suggesting to me, I am talking about co-Counsel now, whether or not I should go forward or not.

Certainly opinions were placed, were discussed and I might add that most of my conversations with respect to that was with Mr. Direnzo because of the pecularity in that one of the defendants could not take the stand because he had a prior record. So that we eliminated him from the proceeding completely.

Q Who is that defendant you were just referring to?

A That was Berman.

Q What was his criminal record?

A I don't know, sir. I don't know. He was not a member of the Hemlock law firm and my recollection is that he was employed by the complainant at one point. I think that was the relationship.

Q Did he have any other relationship?

A Yes, he had a relationship with Mr. Frank, one of the other defendants.

Q Did he have any other relationship?

A I don't know what you mean by that?

Did he have a relationship with Mr. Hoffer?

Q Yes.

A Not to my knowledge.

Q Or with any other defendant?

A Or Mr. Hemlock?

Q Yes.

A That is the only one left.

Q Yes.

A I don't know of any, no, sir.

So I think we are talking about basically Mr. Hemlock and Mr. Hoffer and what their posture is going to be.

Certainly I had Mike Direnzo in my discussion about it. I came to the conclusion that Mr. Hoffer should not testify. As I look back on it, it was an erroneous decision.

Q You had, if I understand correctly, come to a tentative decision that Mr. Hoffer not testify

before Judge Pollack had made a pronouncement as far as the sufficiency of the Government's case, is that correct?

A Almost immediately before that, yes, sir.

You are talking about a mental decision?

Q Yes.

A Not something that was decided between Mr. Hoffer and I?

Q A decision is a mental process.

THE REFEREE: There is something I do not understand in that last question.

You said something about District Judge Pollack having decided something or other.

What was that?

MR. COHEN: I said prior to Judge Pollack having made a pronouncement about the sufficiency of the Government's case.

THE REFEREE: He would not be doing that, would he at this stage?

MR. COHEN: At the end of the Government's case there would be a motion to dismiss.

THE REFEREE: Had there been motions already made? I do not know.

MR. COHEN: That is, I say, prior to his having made any pronouncements, I asked him that question.

A You mean prior to the time that Judge Pollack ruled, on the Rule 29 motions with respect to the Government's proof?

Q Yes.

A At the end of the Government's case.

Q When I say yes, I am really not familiar with Rule 29 but I do know at the end of the Government's case, the people or the Government make a motion. But prior to that motion.

THE REFEREE: You mean the defendants --

Q The defendants make a motion, as far as the sufficiency of the Government's case and prior to that motion, was it your view that Mr. Hoffer take the stand or that he not take the stand?

A You must understand that I make tentative decisions throughout any lawsuit or any litigation as we are going along, contingent upon what I consider the strength of the Government's case. Immediately before the Government rested, I believed that a jury would not convict Mr. Hoffer based upon what I heard in the Courtroom. So I must say that

I came to the conclusion that Mr. Hoffer should not testify based upon the weakness in the Govenment's case.

Q After the Government had put in its case, did you make a motion to dismiss?

A I did.

Q That motion, of course, was denied?

A That is correct.

Q At the time you made that motion, did you elaborate your reason for the motion as to what you regarded as the deficiencies in the People's, the Government's case?

A I am sure I did.

You are asking either do I recall what they are, absolutely not.

I tried fifteen or twenty cases since then, but I am certain that I argued on behalf my client Rule 29, yes, sir.

Q In spite of your argument, Judge Pollack overruled your motion and held that the Government's case was sufficient, is that correct?

A He denied my motion, yes, sir.

Q Did you reconsider whether Mr. Hoffer should

take the stand?

A I am certain I did.

Q Did you discuss it with Mr. Hoffer?

A I am certain I did.

Q Did Mr. Hoffer indicate any desire at that time to take the stand?

A Yes, sir.

Q Did you know that there were inconsistencies as far as the quantum of guilt, as it were, I use the words quantum of guilt, not as a word of art but just ordinary parlance, that there was a difference in the culpability among the parties?

A Did I know that?

Q Yes.

A Is it Mr. Cohen?

Q Yes.

A Mr. Cohen, even a perusal of the Federal Conspiracy Law would come to the conclusion that that statement is absolutely untrue because once a conspiracy is proved, an agreement between the two parties, the quantum of involvement has very little to do with the ultimate rule. The Supreme Court codified that fifteen or twenty years ago.

Q I am aware of that. That's why I didn't use the word quantum of guilt as a word of art but merely to indicate that there were some parties who perhaps were more guilty than others in an equitable sense?

A Mr. Cohen, I think your question assumes that I did believe that certain of the defendants would be convicted and Mr. Hoffer would not.

I, still, looking back at that trial, can't believe that that jury convicted any of the defendants sitting at that table.

Does that answer your question? Because I never got to the point of determining how innocent my client was compared to the innocence of the other defendants.

It wasn't an issue of guilt.

Q Relative culpability?

A You are using the word, "culpability," which I assume is not artfully chosen since it was a criminal case. There is a predetermination when you talk about culpability, that there was a crime committed. I did not believe that a jury could determine that these defendants violated any law based upon the

testimony that the Government adduced at that trial. As I sit here now, I can't believe that a jury convicted them.

Q That is not withstanding the unanimous opinion of the Circuit Court of Appeals?

A Mr. Cohen, I am talking about an issue of fact. If you are talking about an issue of law, you are talking about something quite different, aren't you?

Q I am talking about both.

THE REFEREE: Mr. Cohen, you will remember that the Court of Appeals opens its opinion by saying that, "That taking the facts most favorably to the Government, this is what the jury could of found," and that is of course what they had to do. There was no dispute by the defendants of the testimony. So of course on the appeal the Appeal Court takes the proof most favorably to the Government as the jury could have found it upon the evidence in the case.

Q Wasn't that the only evidence in the case?

THE REFEREE: Of course, except for cross examinations.

A Are you asking me a question?

Q Yes.

A Well, the Circuit Court must decide the case in accordance with the theory adduced by the Government. Therefore, they must accept the facts that a witness states in behalf of the Government's case even if they are incredible from a factual view point.

The United States Court of Appeals, sir, may not review questions of fact as the Appellate Division in the State Court may. Whereas the State Court Appellate Division may review a statement of fact and say, "This is incredible," as a matter of fact, the United States Court of Appeals is not permitted that luxury. The only thing they may look at is sufficiency, as a matter of law, whether it be incredible or not.

So to answer your question, sir, that certainly never crossed my mind at the time we made a determination as to whether to go to the jury or not.

Q Are you saying Mr. LaRosa that the Circuit Court of Appeals could adopt any type of evidence no matter how ludicrous it is, only because the Government has presented it?

A Mr. Cohen, I am giving you the law, sir.

The United States Court of Appeals may not determine credibility, may not determine whether or not a specific set of facts is believeable or not.

Under the Taylor decision they give the trier of the fact, the District Court judge, that right under Rule 29B at the end of all proceedings and before the case is given to the jury.

THE REFEREE: What I would suggest we are off on a tangent here and we might just as well get back to what we are concerned with here.

Q Was there a discussion among yourselves, I mean among you and co-Counsel -- the representatives of the other defendants, that the Defendant Frank and the Defendant Hoffer had different versions of the facts as far as you knew the facts?

A The Defendant Frank and the Defendant Hoffer --

Q And the Defendant Hemlock?

A Please repeat the question. I don't understand it.

MR. COHEN: If you will repeat the question, Mr. Reporter.

MR. KOENIG: I submit that repeating the question won't clarify it any because it is very

confusing to me.

THE WITNESS: I don't understand the question.

THE REFEREE: Are you asking whether the several attorneys for the several defendants conferred among themselves about whether or not each of them should take the stand, is that it?

MR. COHEN: No, that wasn't my question.

Q My question was, did you, as one of the defense lawyers, contemplate whether or not there was a difference of opinion as to what the facts were, what the true facts were with regard to the matters at issue?

A Did I contemplate whether there was an opinion between the particular defendants' version as to what the true facts were?

Q Yes.

A No, sir.

Q There had been some testimony that Mr. Hemlock was only earning a fee?

A Are you talking about Mr. Hemlock or Mr. Hoffer?

Q I am talking about Mr. Hemlock.

And there was also some testimony that Mr. Frank said that this money that was gleaned in the form of

a profit from these transactions was to pay off somebody in connection with the CIA and some fantastic assasin's money?

MR. KOENIG: I am going to object to that because there is no such testimony in the record.

MR. COHEN: There is testimony in the record, your Honor.

THE REFEREE: There is testimony in the record that at a confrontation meeting, as I recall it, out in the place in Long Island, the Gardens.

MR. COHEN. The Queen's home of Mrs. Leon.

THE REFEREE: At one place, I think it was Mr. Frank, who said that they knew very well that the difference between the purchase price and the resale price was used in order to pay off somebody, I think it was in the CIA or which had something to do with the assasination of Mrs. Leon's father.

But I do not get the point.

MR. KOENIG: I don't get it either.

MR. COHEN: Let me finish.

MR. KOENIG: May I state my objection for the record?

Mr. Cohen is questioning Mr. LaRossa on something which has occurred during the course of this proceeding, when Mr. LaRossa is not Counsel and not present.

THE REFEREE: He is not doing that.

MR. KOENIG: That is what he is doing.

THE REFEREE: The testimony in the record of the Federal trial contains that statement by Mrs. Leon. But I do not see what this all has to do with the question -- as far as I am concerned, what I want to know now is, did or did not the witness advise Hoffer that in the witness' opinion Hoffer should not take the stand. That is one, and gave him the reasons therefore, as the witness has told us.

And secondly, there is another question I would like to ask, and that is whether it required any persuasion on the witness' part to get Mr. Hoffer to consent that he should not take the stand.

THE WITNESS: To answer both questions, yes, I did advise him not to take the stand, sir.

Did it take some persuasion?

THE REFEREE: That is another way of asking you, did he say that he wanted to take the stand?

THE WITNESS: Yes, sir, he did.

The question of persuasion, though, I believe that I was strong enough in my suggestion to him that I didn't give him much room for serious argument.

I think he respected my judgment at that point, whether it be in error or not. He did tell me that he thought he should take the stand and wanted to take the stand.

MR. McGILLICUDDY: Mr. LaRossa, was any mention made of his appearance, do you recall that?

When you were talking to him, did you suggest, was there something about his appearance?

THE WITNESS: Yes, sir.

MR. McGILLICUDDY: What did you say to him with respect to his appearance?

THE WITNESS: Unfortunately, I didn't think he made the best appearance no matter how hard we tried.

He was overweight. At the time, very nervous.

that this profit, this windfall profit was in the nature of a legal fee?

A A fee?

MR. McGILLICUDDY: I am going to register an objection at this time on the --

THE REFEREE: I sustain the objection.

I am interested, Mr. Cohen, in finding out whether or not Mr. Hoffer's testimony here, that he wanted to take the stand and he did not take it only because he was overruled in that respect by his attorney, and he deferred to his attorney's experience and his own inexperience, whether that is true. This is the man who can tell us, the man who is on the stand and that is all I am interested in getting from him.

I do not want to go into the merits of the case.

MR. COHEN: Neither do I, sir.

I just wanted to know whether there was a conversation among the lawyers to ascertain whether there should be some proof adduced before that jury to show that this was a legal fee.

THE REFEREE: The witness has told you that

their conclusion was, the attorney's conclusion was, the Government had not made out a case. I think we are wasting a lot of time.

MR. COHEN: Are we discussing about a waste of time at this late juncture?

Very well, then I have no further questions.

MR. McGILLICUDDY: I have nothing further.

MR. KOENIG: I have no questions.

THE REFEREE: Thank you Mr. LaRossa.

M A T T H E W C. D R U S K I N, residing at 230 West 107th Street, Manhattan, New York, called by Respondent Hoffer, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. McGILLICUDDY:

Q Mr. Druskin, you are an attorney associated with Sherman and Sterling, attorneys at 53 Wall Street?

A Yes, sir.

Q You have appeared pursuant or you have accepted service of a subpoena which was so ordered by the Appellate Division, First Department, on October 28, 1974, commanding any officer of First National City Bank here in New York City at 399

Park Avenue to produce certain records?

A I believe that is incorrect.

THE WITNESS: Might I go off the record?

THE REFEREE: No.

A (Continued) On or about October 23, 1974, the First National City Bank was served with a document entitled, "Judicial subpoena duces tecum," signed in the name John M. McGillicuddy.

In response to that subpoena I communicated by letter with Mr. McGillicuddy on October 24, 1974. In that letter I noted and I am quoting, "Since the subpoena was not issued by the clerk of the Court as appears to be required under the rules of the Appellate Division, First Department, Section 603.12A, we regard it as a nullity."

Thereafter I had a telephone conversation with Mr. McGillicuddy, in which he stated to me that he intended to serve a subpoena which would be issued by the clerk of the Court and I advised him that in view of problems relating to Bahamamian Bank secrecy, we would probably move to invallidate that subpoena and I asked that we attempt to resolve this matter informally and I have no knowledge of an additional

subpoena being served on the bank.

MR. McGILLICUDDY: If I may make a statement.

Q You are correct, no subpoena was served on the bank other than the one which you have referred to. But in point in time on October 28, 1974, I had a subpoena --

MR. McGILLICUDDY: Identical to the one that had been served on the bank.

Q -- so ordered by the clerk of the Appellate Division. I had called Mr. Druskin and told him that I had the subpoena so ordered and if your recollection is in accord with mine, you said, "Don't serve the bank. What I will do, I will attend and explain what the bank's position is in the matter." I was in accord.

Is that substantially it?

A I don't recall whether you stated you had a subpoena signed by the clerk or intended to. But if that is your recollection, I have no reason to think it is inaccurate.

Q Thereafter and on or about October 30, 1974, the First National City Bank at 399 Park Avenue, received a letter which was addressed to the attention of Mr. Redding and which was signed by Harry Hoffer,

wherein he made the following request, "Please be advised that in 1968 I was an officer, to wit, assistant secretary of Colombia Corporation, Ltd. and Splindian Investment, Ltd., both Bahamamian corporations, who maintain bank accounts in the First National City Bank branch at Nassau, in the Bahamas. All of the aforesaid accounts were opened in the Bahamas during 1968. During that period, [illegible] time deposit accounts were opened in the name of each of the corporations.

"I herewith request that the following be directed to me forthwith: all signature cards for any and all type deposit accounts in the name of Colombia Corporation and Splindian Investment, Ltd. or Harry Hoffer, for which Harry Hoffer was a signatory, had any control over, or was able to draw upon, including but not limited to all corporate resolutions with regard to said time deposit account. Very truly yours."

Are you in receipt of such a letter or a copy?

A I have a copy of that letter.

Q The letter was received by First National City Bank?

A I believe it was.

Q Could you tell the Honorable Referee here

what the position is of your client, First National City Bank?

A Our position is that to the extent the request is proper under Bahamamian law, where the acccunts are maintained, the bank will comply and furnish the information sought. Upon receipt of Mr. Hoffer's letter dated October 29, 1974, I wrote to Counsel for the bank in Nassau, requesting his opinion with respect to bank secrecy and production of those records and I am awaiting a response from the attorney.

MR. McGILLICUDDY: Mr. Cohen, could I ask you to stipulate at this time that the particular letter which we seek from the Bahamas, the First National City Bank, in response to Mr. Hoffer's letter dated October 29, 1974, that that letter may be received in evidence not withstanding the fact as we contemplate closing the hearings as far as testimony is concerned on Friday of this week, and in the event that the letter is not in our possession by that time, to make an offer, would you stipulate that if it is received at a time subsequent to Friday, that it can be admitted into evidence, not withstanding the fact that the

testimony aspect of the hearing has come to an end?

THE REFEREE: I would like to make one suggestion. That is that you do not limit the stipulation, if you make one, to the answer to this particular letter, because I can see that this may result in an exchange of letters before you get through and you may want a stipulation that would cover all of the letters in that exchange.

Of course, I do not presume to know anything about the law of the Bahamas but I should think that if the parties in interest consent to the disclosure of this information, the bank could give it.

We have no way of giving a consent, for example, on behalf of the account that was opened for the benefit of Mr. Frank.

We have no way of giving any consent for the account that was opened for the benefit of Mr. Berman.

Insofar as Mr. Hemlock and Mr. Hoffer are concerned, they are right here and I do not doubt that they would consent, but I do not know whether

that would be sufficient for the purposes of the bank in the Bahamas.

MR. McGILLICUDDY: I think it is an open question, that they are going to have to make a determination on.

THE REFEREE: Off the record.

(An off the record discussion was had.)

THE REFEREE: Then I think we can excuse this witness.

MR. McGILLICUDDY: Yes.

MR. COHEN: Yes.

MR. KOENIG: Yes.

(Whereupon, the witness was excused.)

THE REFEREE: As a result of the discussion among Counsel and the Referee which was just off the record, Counsel will make an effort between now and the next hearing to enter into a stipulation for the reception in evidence, even though it be after the taking of testimony is closed of any communication which may come from the Bahamas, Nassau, in the Bahamas, with respect to what accounts, if any, Mr. Hoffer had power of withdrawal over.

Is that all right.

MR. KOENIG: Yes.

MR. McGILLICUDDY: Yes.

MR. COHEN: Yes.

THE REFEREE: If I remember correctly, at the time we recessed for lunch, I was in the midst of asking Mr. Hoffer some questions.

H A R R Y H O F F E R, one of the Respondents, having been previously sworn, resumed and testified further as follows:

THE REFEREE: I understand Mr. Hoffer you are still under oath.

THE WITNESS: Yes, I do, your Honor.

THE REFEREE: I think that about concludes the notes which I have made of the reference to you, Mr. Hoffer, in the criminal trial.

If anybody wants to go ahead, they may.

Is there anything further you wanted to add with Mr. Hoffer?

MR. McGILLICUDDY: Excuse me a moment.

THE REFEREE: Why not take a five-minute recess and you can make up your mind about that.

(Whereupon, a short recess was taken.)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

- X

In the Matter :

of :

ALFRED J. HEMLOCK, :

An Attorney. :

- X

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

- X

In the Matter :

of :

HARRY HOFFER, :

An Attorney. :

- X

REFEREE'S REPORT

AND

OPINION

I, George Trosk, the referee appointed in each of the above entitled proceedings by separate Orders of this Court made and filed herein September 10, 1974, to take testimony in regard to a charge of unprofessional conduct against the respondent therein named, as set forth in the petition of The Association of the Bar of the City of New York verified May 6, 1974, and to report the same, with my opinion thereon, to this Court, do hereby report as follows:

In each of the above entitled proceedings, the petitioner was represented by John J. Bonomi, Esq., its attorney, Oscar J. Cohen, Esq., of counsel. In the proceeding against Alfred J. Hemlock, Esq., the respondent was represented by his

attorney, Raphael P. Koenig, Esq.; in the proceeding against Harry Hoffer, Esq., the respondent was represented by his attorney, John M. McGillicuddy, Esq.

I was duly sworn, separately in each of said proceedings, before Hon. Xavier Riccobono, a Justice of the Supreme Court of the State of New York, on September 25, 1974.

Since the charge against each respondent is the same, i.e., joint participation by them, with others, in a conspiracy to defraud, for which they, together with others, were tried jointly, and convicted, in the United States District Court, Southern District of New York, and since separate hearings as to each respondent would have resulted in the repetition of virtually all the same testimony, it was stipulated by all the parties and their respective attorneys, and approved by the referee, that the respondents be tried here jointly, with the right to each of them to be present, with his own attorney, at the joint hearings, to call witnesses and to cross-examine each other's witnesses.

Hearings were held before me, as referee, on September 25, October 10, 22 and 25, and on November 7, 8, 12 and 14, 1974, in the County Court House in New York County.

THE PETITIONS

Except for the difference in the name of the respondent, the language of both petitions is the same. Each alleges

that on September 11, 1973, a jury in the United States District Court, Southern District of New York, found the respondent therein named guilty of unprofessional conduct, in violation of Section 90 of the Judiciary Law, in that, in or about January 1967, he conspired with others to devise a scheme to defraud Maria de los Angeles Trujillo de Dominguez and Planning and Investing Company S.A. ("Planinvest"), a Luxemburg corporation owned and controlled by her, and to obtain moneys from her and said corporation by means of false pretenses; to induce Dominguez and Planinvest to purchase foreign real estate for investment purposes through the unlawful use of the United States Postal Service; that in or about January 1968 the conspirators caused title to a Montreal, Quebec, parcel of property to be transferred from them, using assumed names, to Dominguez and Planinvest in exchange for $778,500, knowing that said parcel was worth "less than one-tenth" of that amount; that in February 1968, in like manner, and by similar means, the conspirators transferred to Dominguez and Planinvest another parcel of Montreal, Quebec, property in exchange for $361,500, knowing that the parcel involved was then worth "less than one-tenth" of the amount for which it was exchanged.

The petition then alleges that respondents were sentenced to imprisonment and fined.

A copy of the indictment and of the certificate of conviction are annexed to each petition.

I shall hereinafter refer to the Federal criminal proceeding as "the criminal case".

THE ANSWER

In each proceeding, the respondent's answer admits the allegations of the petition, except that he denies the allegation that he had been guilty of unprofessional conduct in violation of Section 90 of the Judiciary Law. The answer also alleges that an application to the Supreme Court of the United States for a writ of certiorari to the U. S. Court of Appeals has been filed in the Supreme Court, setting forth several "substantial reasons", six of which are described, for granting the writ, and that, in the opinion of the petitioner there, "There is reasonable belief that it will be granted".

[Prior to the commencement of the hearings herein, the writ had been denied by the Supreme Court.]

THE SCOPE OF THE EVIDENCE TO BE RECEIVED

At the outset of the hearings, and consistently throughout them, counsel for petitioner contended that the judgment of conviction is conclusive evidence of guilt, and objected to the receipt of any evidence by respondents other than that bearing on the sanction to be applied by this Court.

The question thus raised was the subject of a statement by me (S.M. pp. 99-108), the substance of which was that, this Court having referred these proceedings to me by an Order

directing me to "take testimony in regard to said charges" -- referring to the aforesaid specifically described charges of "professional misconduct" set forth in the petitions -- I was required to conclude that this Court, after due deliberation, had determined that (1) the Grand case (32 N.Y.2d 300) did not overrule or disapprove Keough (17 N.Y.2d 419) or Kahn (38 A.D.2d 360), each of which was a disciplinary proceeding in which a prior judgment of conviction was treated as only presumptive evidence of guilt, and the respondent therein was permitted to go into the merits in his effort to establish that the presumption had been overcome, and (2) the hearing was not to be limited to evidence bearing only on the sanction to be applied by this Court, but to extend to evidence relating to the "charges" themselves -- and that I would, accordingly, treat the convictions as presumptive evidence of guilt, and take such appropriate evidence as respondents would offer in an effort to overcome the presumption.

Petitioner has a running objection to the reception of any evidence other than that bearing on mitigation of punishment.

THE RECORD OF THE PROCEEDINGS IN THE CRIMINAL CASE

Before taking any evidence, consideration was given to the effect to be given here to the record of the trial in the criminal case. It was found that with only a few unimportant

exceptions, all the witnesses who testified at the trial of the criminal case were now non-residents of the State of New York, so that their testimony in the criminal case would be admissible here under C.P.L.R. Sec. 4517 and various court decisions. It was then stipulated by all parties that the entire record of the criminal case should be received in evidence here, and it was.

THE TRIAL IN THE CRIMINAL CASE

Before proceeding to a review of the evidence in the criminal case, I should point out:

1. In the midst of the period here involved, Mrs. Luis Jose Leon (nee Trujillo) divorced her husband and, by another marriage contracted by her immediately after divorce, became Mrs. Dominguez -- the complainant and principal witness in the criminal case. The result was that in the trial of that case she was sometimes referred to as Mrs. Leon, and at other times as Mrs. Dominguez, depending on whether the event under consideration occurred before, or after, her remarriage. To avoid the confusion thereby created, I shall refer to her throughout this report by her first name -- Maria -- unless the context at a particular time makes it advisable to indicate what her last name then was.

2. One of the defendants in the criminal case,

who is involved in some of the events referred to in these proceedings, is named in the title of the criminal case as "Stephen Borgman, a/k/a Steve Miller, a/k/a Stephen Berman. In her testimony in the criminal case, Maria referred to him as "Miller", the name by which he was introduced to her and by which she knew him. Respondents knew him as Berman, and so referred to him in the hearings here. To avoid confusion, I shall refer to him as "Berman", and shall substitute "Berman" for "Miller", wherever he is so referred to either in the record of the criminal case or in the testimony here.

The Federal court, District Judge Pollock presiding, after dismissing certain of the counts in the indictment, submitted the case to the jury, which acquitted on a few of the remaining counts, and convicted the defendants on all the principal ones. Respondents were sentenced to imprisonment and fines.

On appeal to the United States Court of Appeals, the convictions were affirmed. Applications to the United States Supreme Court for certiorari having been denied, each of the respondents made a motion for reduction of sentence.

[I am informed that Hemlock's motion has been denied, and Hoffer's is still undetermined.]

A SUMMARY STATEMENT OF THE ISSUES
AND THE CONTENTIONS OF THE PARTIES

In view of the volume and the range of the evidence to be reviewed, I believe the Court will be facilitated, in assessing the pertinence and the bearing of the testimony as it unfolds, by a brief statement, at this point, of the issues and the contentions of the parties in reference thereto.

On January 1, 1968, in the Nassau, Bahamas branch of the First National City Bank of New York (the "Nassau bank"), Columbia Corporation Ltd. ("Columbia"), a Bahamian corporation, bought from A. Arthur Kay ("Kay"), a Canadian, for $105,000, a parcel of land in Montreal, Canada (the "Sherwoode parcel"), and immediately thereafter sold it to Planning and Investment Corporation ("Planinvest"), a Luxemburg corporation, for $778,500.

On February 5, 1968, in the same place, Splindian Investments Limited ("Splindian"), a Bahamian Corporation, bought from Denise Comeau, a Canadian, a parcel of land located in Montreal, Canada (the Comeau parcel) for $200,000, and immediately thereafter sold it to Planinvest for $361,000.

By the foregoing transaction, petitioner charges, the complainant, Maria, was defrauded of about $1,000,000. This claim is based on the undisputed facts that (a) except for a few qualifying shares which complainant was required to leave in Luxemburg, she was the owner of all the capital stock,

and in complete control, of Planinvest, and (b) respondent Hemlock, one of her lawyers, and Frank, another of her lawyers, the latter being also the general administrator of her affa 's here, as well as one of her "security officers", and Berman, another of her "security officers" were, in equal shares, the sole stockholders, directors and controlling officers of both Columbia and Splindian.

In addition to the foregoing undisputed facts, petitioner claims that the complainant was not told, and did not know, of the purchases of the Sherwoode and the Comeau parcels, and their resale to Planinvest, or of the terms of said transactions, until long after they had been consummated.

Respondent Hemlock contends that the Sherwoode and the Comeau parcels were acquired, and then conveyed to Planinvest, in the manner, and on the terms above described, with Maria's full knowledge and approval at the time of their acquisition and resale; that prior thereto Hemlock, Frank and Berman had, at Maria's request, performed extremely valuable services for her, at great physical peril to themselves, for which Maria had agreed to pay them $1,000,000, to be divided equally among them; that Maria, being at the time without adequate personal funds with which to pay them, determined to pay them through her wholly owned Planinvest, but since Planinvest was precluded by law from using its funds to pay a debt owed by Maria personally,

she devised and approved the plan which was employed, i.e. that Hemlock, Frank and Berman would buy land, and Planinvest would purchase it from them at a price sufficiently in excess of what they had paid for it to net them sufficient to pay their $1,000,000 fee.

Respondent Hoffer contends that he had nothing to do with the selection of either the Sherwoode or the Comeau parcels, or the terms on which they were purchased and then resold to Planinvest; that Hemlock, his employer, had told him, and he believed, that the plan for these transactions, and the terms thereof, had been devised and approved by Maria; that the closings had been conducted by a Canadian notary; that he had no interest, directly or indirectly, in any of said transactions, or in Columbia or Splindian or its property; that he was never to receive, and never did receive, any part of the proceeds of any of said transactions; that whatever he did in connection with them was done on Hemlock's instructions, and all he was to receive for the services he performed in relation to them, and all he did receive, was his regular weekly salary as Hemlock's office employee.

THE TRIAL OF THE CRIMINAL CASE

Maria, the complainant and the principal witness in the criminal case, was born in the Dominican Republic on June 10, 1939; she was still a citizen of that country, and about

twenty-nine years of age, at the time of the events here involved.

At the trial of the criminal case, Maria gave the following testimony:

She came here in August, 1967, from Madrid, Spain, where she and her family -- her husband, three children, her mother and her brothers -- lived. On arrival she was met by Frank, a Washington, D.C. lawyer who had handled affairs here for the Trujillo family, and whom she had known, for "a long time". Her husband Luis Jose Leon ("Leon") and her brother Ramfis had, from Spain, been in touch with Frank and arranged with him to take care of her and the two children she brought with her on their arrival. With Frank, at the time Maria met him, was Berman, whom Frank introduced to her as "Miller".

Maria testified that Frank and Berman advised her to open an account in The Bank of New York, and they accompanied her to the bank, when she did so. Thereafter, they advised her to open another account, i.e. in the New York branch of the Bank of London and South America ("Bank of London"), in the London office of which she had an account, so that funds could be transferred to the New York branch "for expenses".

The next person she consulted, said Maria, was Hemlock, to whose office she was taken by Frank and Berman, and there introduced to him. On that occasion, she testified, she told

Hemlock of her desire to get a divorce from Luis, and to escape, with her three children and her possessions, to America. She spoke of the difficulties she had encountered because of the type of person her husband was, and his imperious control of their household.

Maria testified, further, that about September 9, 1967, Hemlock went to Barcelona, and there succeeded in the execution of a plan, devised, she said, by Frank and Berman, to lure Luis and his bodyguards from Madrid to Barcelona for some days, during which time she was able to escape with her children and her possessions to America.

Maria testified that at a meeting with Hemlock in September 1967, she told him she wanted to change the address of her bank account, and wanted him to prepare powers of attorney from her to her mother and her brother, who were in Madrid, to enable them to "take care of my finances, my corporations, in Spain".

At that time, Maria testified, she had about $1,000,000 invested in mutual funds; that she had two income properties; a bank account of about $2,400,000 in London; an unfinished apartment house, as well as her home and surrounding land, in Madrid, and a chain of department stores in Spain, which were not "producing", but the worth of which she "estimated" at "approximately" six million dollars.

On cross-examination, Maria testified that she owned

various corporations not included among those she named on direct, and that, in addition to the assets she mentioned on direct, she owned jewelry valued, prior to her coming here, at $984,898, and she owned pictures and objects of art worth $200,000 to $300,000.

The reason her corporations were organized in jurisdictions where ownership was "secret", she said, was "probably" because the Dominican Republic had passed Appropriation Decrees confiscating all Trujillo property "until the third generation", and also because her father's illegitimate children were suing her in Switzerland to recover what she, her mother and her brothers had taken, and they feared the claimants would "follow" her outside the Dominican Republic, and reach assets by discovery proceedings here if they learned of her assets.

Maria identified a letter, dated September 19, 1967, on the letterhead of Hemlock's firm, addressed to the London office of the Bank of London, signed by Hemlock and, on behalf of Planinvest, by Maria. In that letter, the bank was instructed "to forward all communications and notifications" in reference to the Planinvest account "in care of Hemlock, List, Hoffer & Becker, Esqs., 250 Broadway, New York", and to transfer the interest "as soon as possible" to Maria's account with The Bank of New Yor' here, and repeating that "no communications or correspondence" shall be forwarded to any address other than

that of the Hemlock firm, given above (all the underlining is in the original).

Later on, Maria directed the bank to send such communications and correspondence to Planinvest, in care of John J. Frank, 2 East 86th Street, New York, where he and Berman had offices adjacent to Maria's, and still later, in November, when Maria bought a home in Forest Hills Gardens, she directed the bank to send her mail to her at her Forest Hills Gardens address.

Maria testified that from "probably" October or November, 1967, Frank and Berman began "insisting" that she purchase foreign land, to avoid the effects of the devaluation of the dollar, they told her; that she told them she would consult her brother, in Madrid; that he advised against it, and she so told Frank and Berman; that they continued to urge her to invest in Canadian land -- "the country was blooming", they said -- and finally, in December, she told them she would be willing to buy it if they would look around and bring her the information, to see "whether or not I would be interested", but, she told them, she would not spend more than $200,000.

Maria testified that she never asked Hemlock or Hoffer to find any land for her in Canada; that they never suggested that she should buy any, and that they had nothing to do with

the location of foreign land for her. In a statement she gave the F.B.I., she is recorded as having said the same thing. But in her testimony before the Grand Jury, she testified that she authorized Frank, Berman and Hemlock to purchase real estate for her for investment purposes, and at the trial she claimed the transcript of her statement to the F.B.I. was "inaccurate".

In January 1968, Maria testified, Berman came to her apartment and said: "Oh, you have purchased land in Canada," and that she answered: "How can that be. I told you to look for a good piece of land, not to buy it for me"; that Frank came in and she told him about it, and he said: "Oh, don't worry, everything is all right," and that the price paid "was within the limits I had told them". She testified that Berman said: "Don't you remember signing the check?", and that she was "embarrassed" because she could not remember it. She testified she did not press either of them to tell her the amount they had paid, and she did not discover it until September, 1968.

Maria testified that Frank and Berman would bring her checks "by package" for her to sign; that sometimes the payee would be inserted, but not the amount, and they would say they did not know "exactly"; she said she "trusted them".

What happened in reference to the purchase of the land

in Canada is disclosed by the evidence, mostly documentary, introduced at the trial of the criminal case. This shows the following:

On January 11, 1968, in the Nassau bank, A. Arthur Kay, of Montreal, Canada, conveyed a tract of land on Sherwoode Street, Montreal, to Columbia for $105,000. The deed was executed on behalf of Columbia by A. C. Hepburn, as Vice President, and Celia Neill, as Assistant Secretary.

On the same date, Columbia, acting by said Hepburn and Neill, conveyed the Sherwoode parcel to Planinvest. One Herbert M. Lefkowitz presented a check of Planinvest, signed by Maria, as president, for $778,500, the purchase price, and a copy of a resolution of the Board of Directors of Planinvest, certified by Maria, as president, authorizing Lefkowitz to execute the deed on Planinvest's behalf, and he so executed it.

On February 5, 1968, at the Nassau bank, Denise Comeau, of Montreal, sold a parcel of land in Montreal, Canada (the "Comeau parcel") to Splindian for $200,000 and Splindian resold it, the same day, to Planinvest for $361,500. The same Hepburn and Neill who signed for Columbia on the Sherwoode transaction signed for Splindian on this one, and again Lefkowitz executed the deed for Planinvest, he having produced a Planinvest check for $361,000 signed by Maria, as president, and a resolution of its Board of Directors,

certified by Maria, authorizing him to sign, as agent.

The check for $361,000 had been brought to the bank for certification, by Berman, and, after certification had been returned to him at the bank.

The Sherwoode and the Comeau closings had been conducted by Elie Solomon, a Canadian lawyer who was also a Canadian notary. Solomon testified that it was the duty of a Canadian notary to examine the title to the land, prepare the documents, search the title and, in general, handle all legal aspects of the transaction.

Maria testified at the trial of the criminal case that she knew no one by the name of Lefkowitz, and that she knew nothing of the foregoing Sherwoode and Comeau transactions at the time of their occurrence; that she had tried, unsuccessfully, to get the figures from Frank; that she did not learn of these transactions, or the amounts paid, until sometime in September, 1968, when her Spanish lawyer, after he had interviewed Solomon, in Canada, gave her the figures.

Maria testified that upon learning the facts, she told Frank that the figures given her "were not the price I had authorized to be paid"; that Frank said "not to worry, it was a good piece of land and worth what we paid for it".

At the trial of the criminal case, Maria identified her signature on both Planinvest checks and the resolutions

of its Board of Directors; she said she could not recall signing any of them. The money for the $778,500 check had been made available to her here by transfer from her account in London, but she could not recall having authorized it. Frank and Berman, she said, took care of everything -- "I trusted them" -- and any credit transfer from London would have come to Frank; at that time, she said, all communications were sent to him at 2 East 86th Street, New York City, where Frank and Berman had an office, as she also did. Her bank credit here, prior to the transfer, had been $204,798.81. The $778,500 check delivered at the closing had been brought to the bank for certification by Berman, and after certification it had been returned to him at the bank.

Maria testified that she might have signed checks in blank; that the check-book was kept by Frank and Berman in their office until February or March 1968, when her Spanish lawyer "took over". She identified the entry on a stub in the check-book, relating to a check for $775,500, but the stub contained no statement of what the check was for; it stated only the amount. Maria testified that the check-book had been in her possession since February or March, 1968, but that she did not see the entry, or know that the check had passed through her account, until "we began to investigate between June and September, probably".

Hori, who had sold the Sherwoode parcel to Kay, testified that one section of it was "swamp and marshy"; there

were no sidewalks, and the swamp and marshy area ran right up to the road and was visible from it. An old house which had been on the plot had burned down in 1963 and had not been replaced.

Maria testified that she never inquired of the bank what amounts had passed through her account -- again, she said, she "trusted" Frank and Berman "for everything".

In November 1967, Maria bought a home in Forest Hills Gardens, Long Island, for $145,000, and she made changes and improvements therein costing about $1,000,000, using an architect and a decorator recommended by Hemlock.

During July, August and September, 1967, said Maria, she had meetings in reference to her financial affairs at the Forest Hills Gardens house with Hemlock, Hoffer and Blumenberg, the latter a lawyer-tax specialist recommended by Hemlock.

Maria testified that at one of the said conferences, at which she "thought", but was not sure Hoffer was present, she told Hemlock to "check" everything about the deal and the Canadian property.

Maria testified that in September 1968, at a conference at her Forest Hills Gardens house at which Hemlock, Blumenberg and Hoffer were present, she told Hemlock "we" had information from Canada that he had been in Canada "several times", making arrangements to purchase the lot; that "we" were "very surprised" because "we" did not know that

he had been involved in this; that Hemlock was "very upset", got "nervous", and said "I smell a rat"; further, that as she left the meeting Hemlock said "I think somebody has been using my name".

The "next thing" she could recall, Maria testified, was that she and her husband told Hemlock "we" received information from Canada "that the lot was not worth what we paid for it", and Hemlock said he would get in touch with Frank and Berman to try to arrange a meeting with them the next day.

Her aforesaid statement to Hemlock, Maria testified, was based on the report she received from her Spanish attorney, after he had received the figures from Solomon. This report, said Maria, was what raised her first suspicions.

On September 28th, Maria testified, Hemlock phoned that he had arranged a meeting with Frank and Berman for the following day, and that she should come without her husband. This she declined to do, and then Hemlock said she should bring him. The meeting was held as scheduled. When she arrived with her husband, Hemlock asked him to wait in the outer room, which he did. When she and Hemlock entered his room, Frank and Berman were there. Maria testified that Frank and Berman said the property was not worth what was paid for it; that the difference was used to pay off the CIA, because she was in "activities" to kill one of the men who had assassinated

her father. She said she did not think she answered that; that Frank and Berman left; that Hemlock then called in her husband and repeated the story to him, and that as she left she said: "This is preposterous, incredible". Maria also testified to a different version, i.e. that Berman and Frank said they knew the lot was not worth what was paid for it, but that they wanted one that "wouldn't have much loss with it, so it would increase in value easily, and that the difference was taken for that purpose". She said she could not recall if Hemlock participated in the discussion, that "it was Frank and Berman who said that".

Solomon, the notary who conducted the closings, testified at the trial of the criminal case to various acts by Hoffer, i.e., being met at the Nassau airport by Hoffer, with a limousine, on his arrival with Kay, Hebert and others for the first closing; that "all" of them went to the Nassau bank, where the closing was to take place; that the name "Planinvest" was given to him by "either Mr. Hemlock or Mr. Hoffer", to be inserted in spaces Solomon had left in the deeds, which he had prepared in advance; that "to the best of my recollection", Hoffer gave him the name of the purchasing company and the place of its domicile, and told him it would be represented at the closing by Lefkowitz, as agent; that Hoffer promised that copies of the Certificates of Incorporation of Columbia and of Splindian would be sent to Solomon by

mail, and that Solomon received them from Hoffer about a week later, for which Solomon sent Hoffer an acknowledgement; that after the first closing, he, Solomon, met with Hemlock, Hoffer, Kay and Hebert, and Hoffer gave him and Kay's attorney, Adessky, $500 each for their services; that on return to New York, he gave a certified copy of the deed to Hoffer, who was waiting at the airport; that he was advised "by either Hemlock or Hoffer" to have an advertising neon sign on the property removed, and to return to the lessee of the space the $150 which he had paid.

In connection with the second transaction, Solomon testified, he, Adessky, Kay and Miss Comeau picked up Hemlock in New York, and they went to Nassau, where they were picked up by Hoffer and taken to a hotel; that all of them reassembled at the Nassau bank the next morning and "completed" the transaction; that in a discussion as to Planinvest's power to hold real estate, Hoffer said he was "certain" Planinvest had the "proper powers"; that he, Solomon, wrote Hoffer on January 20th "for further documentation and proof of the power", to which he received no reply.

Michael V. Latvis, the manager of the Nassau bank from August 1, 1967 to November 1968, testified to the opening of the Columbia and Splindian accounts in his branch in January 1968; that it was his recollection that they were 90 day time deposit accounts, and the "principals" were associated "with

the firm of Hemlock, Hoffer and I think Becker". Latvis testified that after the lapse of thirty or sixty days, the bank was requested to "break" the deposit period and to pay out in cash, and the bank did so.

Mr. Latvis's secretary, Miss Reilly, testified that she was sitting alongside Mr. Latvis when the Columbia account was opened; that "Hoffer and Hemlock" opened it with a check for $778,500 and the signing of signature cards; that "they" wanted "immediate clearance" of the check; that when they were told by Latvis that this would be impossible, since the check, though certified, would first have to clear in New York, which might take as long as eight days, they suggested that a messenger be sent, with the check, to New York, to get the necessary clearance, and she was sent; that "they" furnished airplane tickets and gave her $100 for "expenses", and that the day after her arrival in New York (she had arrived too late to do so on the day she arrived) she got the clearance, notified Mr. Latvis, and returned to Nassau at the close of the week-end.

Miss Reilly also recalled that there had been an "identical situation" with respect to another check brought in by Hoffer and Hemlock "about a month or so later".

The foregoing, I believe, fairly summarizes the proceedings at the trial of the criminal case, up to the point where the prosecution rested. The defendants did not take the

stand, and called no witness.

The reasons the respondents did not take the stand in the criminal case may be of interest to the Court, even though, theoretically, no inferences may be drawn against them for having remained mute.

RESPONDENTS' FAILURE TO TESTIFY AT THE TRIAL OF THE CRIMINAL CASE

Hemlock was represented at the trial of the criminal case by Michael P. Direnzo, Esq., an attorney admitted in the First Department in October 1937, and, since then, specializing in representing defendants in criminal cases.

Mr. Direnzo testified that, before the criminal trial started, he and Hemlock reasoned that there would be an issue of fact, and that Hemlock should, and would, testify; that when the prosecution rested, counsels' strategy dictated that no testimony be offered on behalf of the defense because it was a "one witness case", the complainant's story was "totally unbelievable", and the jury would acquit. Mr. Direnzo testified, further, that he told Hemlock: "You've got to worry not only about assistant United States attorney MacDonald [who had tried the case for the Government] but about assistant United States attorney Pollock [the Judge who presided at the trial]"; that "I'm sure the judge doesn't like you. He thinks you're too smart", and that by the questions the Judge would put to Hemlock, the Judge would "influence the

jury adversely as far as you are concerned". Mr. Direnzo said "I almost directed" Hemlock not to testify, and Hemlock replied: "Under these circumstances I'll yield to your judgment".

"It took persuading," said Direnzo, "it took more with Hoffer than it did with Hemlock, but it took a great deal of persuading with Hemlock, as well."

Respondent Hoffer was represented at the criminal trial by James M. La Rossa, Esq., who was admitted in 1958. From 1962 until 1965, Mr. La Rossa had been an assistant United States Attorney in the Eastern District, where he handled the trial of criminal cases, and since leaving that office he has, with "very few exceptions", represented clients in criminal matters in the Federal courts.

Mr. La Rossa testified that "for a number of reasons", he "strongly recommended" to Hoffer that he not take the stand; first, he had "very serious doubts" that Hoffer's complicity had been established; second, he believed that if the Court sent the case to the jury, they would not believe Maria's testimony; third, "Mr. Hoffer was, in my opinion, a nervous individual; no matter how he tried, he had difficulty in making direct answers"; he was overweight, he kept blinking his eyes, and his hair looked as if he were "a wild man" and "that, I told him, was how he would impress the jury".

La Rossa testified that Hoffer "wanted" to testify, and his wife "almost insisted" but Hoffer relied on La Rossa's

convicted of murder in the Dominican Republic, and he would not be permitted to enter the United States.

Hoffer testified that Hemlock told him that Maria had assets in Spain, corporations throughout the world, "extremely valuable" time deposits, mutual funds, "tremendous amounts" of jewelry, and other "various" assets; that Luis refused to permit her to take her assets out of Spain, and that, whenever she left Spain, he kept one or more of the children, as hostage, to insure her return.

The problem, Hemlock told Hoffer, was to find a way to get Luis out of Madrid, where the family lived in a "palace", and to keep him away long enough to enable Maria, while back in Madrid, to get the children and her possessions and escape to America with them.

In due course, Hemlock told Hoffer that he, Hemlock, had devised a plan; he would pretend that he represented a client interested in acquiring a department store in Barcelona, which Maria owned, and was managed by Luis; that he, Hemlock, would arrange to have him come to Barcelona to negotiate about the pretended transaction, thereby giving Maria, who would then be in Madrid, time to "get her children, get her assets, pack up and leave".

Hemlock instructed Hoffer to get in touch with the New York office of Arthur Anderson & Co., an international accounting firm, find out if they had a Barcelona office, and

if they did, to have them get their Barcelona office to communicate with Luis and tell him that they were retained by someone interested in purchasing the Barcelona store to make a pre-purchase audit of it; also to get Luis to come to Barcelona to discuss the purchase with the American attorney for the proposed purchaser; and to engage an attorney in Barcelona who would act with Hemlock in the discussions to be had with Luis in Barcelona. The Anderson firm was not to be told, and was not told, that this was all a pretense.

Hoffer did as directed, and arrangements were made accordingly by Arthur Anderson & Co.'s Barcelona office.

Hemlock told Hoffer that his trip would be a "perilous" one, because Luis was "ruthless" and "very dangerous", and if he discovered the ruse, Hemlock's life would not be worth anything. He also told Hoffer that when he, Hemlock, would be in Barcelona, Frank and Berman would be in Madrid, acting as bodyguards for Maria, and helping her take the children and her possessions and escape to America.

Hoffer knew that Berman had been a client of Hemlock's in years past, and that Berman had brought Frank to Hemlock, but Hoffer did not know, and had never met, Frank, who, Hemlock told Hoffer, was a Washington, D.C. attorney and had represented the Trujillo family here "for many years; that Frank was advising Maria here, and, with Berman, was acting as Maria's bodyguard here.

Hemlock told Hoffer that he, Hemlock, had taken a "crash course" in department store operation and accounting, so as to be able to appear knowledgeable in the conferences he was to have with Luis.

Hemlock told Hoffer that because of the importance of the project to Maria, and the personal risks Hemlock would take in conferring with Luis in Barcelona, Maria was going to pay Hemlock an "enormous" fee.

Before leaving for Barcelona, Hemlock instructed Hoffer that, in Hemlock's absence, Hoffer should reserve hotel accommodations to be available for Maria on her return, and to do so under another name, so that Luis' agents would not be able to trace her here; further, through brokers, to look for houses in various areas in Connecticut and to locate schools in which Maria could enter her children on Maria's arrival here with them.

Hoffer testified that Hemlock left for Barcelona early in September 1967, and was out of the office for five or six days.

On Hemlock's return, Hoffer gave Hemlock a detailed written report of the things Hoffer had attended to during Hemlock's absence, pursuant to Hemlock's instructions. Hemlock told Hoffer of what Hemlock had done in Barcelona. He said Maria's husband and both his bodyguards had been armed; that by arrangement with Frank and Berman he had kept in touch with

them at their hotel in Madrid during breaks and siestas so as to know what progress was being made by Maria in Madrid; that it had taken Maria longer than it needed to -- she wanted to take everything -- with the result that he, Hemlock, had prolonged the negotiation, although he knew that if he were discovered "his life wasn't worth anything"; that as soon as he got word that Maria had left, he deferred the negotiation, went to his hotel, where all was packed and in readiness, and checked out, "glad to get out of there". Hemlock repeated that he, Frank and Berman were to receive a "tremendous" fee because of the perils they had gone through.

Hoffer testified that toward the end of September 1967, he was told by Hemlock to prepare powers of attorney from Maria to her mother and her brother, who were in Spain, so that they could take care of assets which Maria still had there, and to get the necessary information from her, at her hotel. Hoffer did as directed. This was the first time he met Maria. With the help of a Spanish translator, Hoffer prepared the powers of attorney and brought them to Maria, at her hotel. Frank and Berman were with her. Maria executed the powers before Hoffer as notary on September 20, 1967. Having done this, Hoffer gave Hemlock a detailed written report of what he had done.

Hoffer testified that the reason he was assigned to prepare the powers was that he was the only one in the office

"who did this type of work".

Hoffer testified that in October or November, 1967, Hemlock told him that Maria was buying a house in Forest Hills Gardens, and instructed Hoffer to get the contract from the seller, who was an attorney and would prepare the documents, and that Hoffer should review them. Hoffer did as directed; Maria signed the contract, and Hoffer, as directed by Hemlock, represented her at the closing. The purchase price was $145,000; Hoffer had told Hemlock how much she would need at the closing, and she had a check for that amount. Hoffer had nothing to do with the preparation of the check, and he did not know who did. Here, again, he testified that the "job" was assigned to him because he was the only one in the office who handled real estate closings.

Hoffer testified that the first time he heard of a contemplated transfer of Canadian land was toward the end of November, 1967, when Hemlock told him that Maria had not paid him, Frank and Berman any part of the $1,000,000 she had agreed to pay them for what they had done for her in Spain, and that, for a "variety of reasons", she desired to make payment by having them buy real estate in Canada and resell it to her for a larger amount than they had paid, the excess to be remuneration for their services in Spain.

In a later conversation Hemlock told Hoffer that the reason for using Canadian land was that Maria was a non-resident

alien; that all her corporations were outside the United States, and she didn't want any of the transactions to be subject to United States taxation; also, Hemlock told Hoffer, the Dominican Republic had issued an "expropriation order" of all the dictator's property, and therefore she had "bearer" corporations, whoever had possession of the certificates owned the corporation; also, that in the Dominican Republic her father had illegitimate children who were suing in Switzerland for a portion of the assets her mother, her brothers and she had taken; that she didn't want the "illegitimates" to know her assets, and that records of an outside-country transaction would not be accessible to them in discovery proceedings in the United States.

Hoffer testified that this being a real-estate transaction, Hemlock directed him to go to Canada in December 1967, to meet a lawyer, Hebert, who Hemlock said was a friend of his. Hoffer went as directed; Hebert "brought in" Kay, who Hebert said was the man to see if one wanted real estate in Canada.

Later, there was another meeting in Canada, attended by Hemlock, Kay, Hebert and Hoffer; Hebert said Kay would assist Hemlock in finding a piece of property; there was a "private discussion" between Hemlock and Kay, and Hebert said a notary public would be required at a transfer of Canadian real estate, a subject with which Hebert said he was not familia

Hoffer testified that Hemlock told him to get "sufficient information", if he could, about the transfer of Canadian property; that Hemlock would "ascertain" a piece of property, and "I was to find out about the mechanics of closing on it".

Hoffer testified that, with Hemlock, he went to Montreal again in 1968, where they met Irving Adessky, Kay's attorney, in Adessky's office, and he explained how property is transferred in Canada. No particular parcel was discussed.

Hoffer said that Adessky suggested that the closing not take place in Canada, because it would benefit Kay tax-wise. After their return to New York, said Hoffer, he learned that a tax accountant had advised that it would benefit Hemlock, Frank and Berman if the closing took place in the Bahamas.

Hoffer testified that Hemlock told him that Hemlock, Frank and Berman were to organize a corporation which would buy property and resell it to Maria's wholly owned Planinvest for more, and that in that way they would get the fees owing to them. Hoffer testified that Hemlock told him that Maria had approved the handling of the matter in that way.

Hoffer testified that he asked Hemlock for the reason for this method, and that Hemlock did not discuss it: he said merely that "this was to be the method". Hoffer testified that he never heard the question discussed, and he did not think it was his place to raise any further question about it: it

was his business to follow Hemlock's instructions, "as a mechanic" handling a real estate transaction.

On their return from their second trip to Canada, Hoffer testified, Hemlock instructed him to get the name of a lawyer in the Bahamas to be "contacted"; that he did so, and on January sixth or seventh, 1968, three days prior to the date set for closing, he went to Nassau at Hemlock's direction, and there consulted with one Hepburn, an attorney; that he told Hepburn that he, Hoffer, wanted two corporations organized, and Hepburn said he had two "inactive" ones in his office, i.e. Columbia and Splindian. As directed by Hemlock, Hoffer had Hepburn make Hemlock, Frank and Berman the sole stockholders, directors and principal officers, except that Hepburn and his secretary, Miss Neill, were given qualifying shares, Hepburn was made Vice President and Miss Neill Assistant Secretary, which Hepburn said was the "customary" way there, and Hoffer, the only one then in Nassau to do things which might need attention prior to the closing, was made Assistant Secretary.

As Hemlock had directed, Hoffer opened a ~~time~~ deposit "Checking" account for Columbia in the Nassau branch with power to him to sign checks; he deposited in the Columbia account $5,000 which Hemlock had provided, and then, pursuant to Hemlock's instructions, Hoffer wired the $5,000 to Kay, as a "binder" on the sale of the Sherwoode parcel to Columbia: this, said Hoffer,

was to make sure Kay would come to the closing, since no written contract of sale had been executed, Kay had not received anything, and he required some payment in advance before incurring the expense of going to Nassau.

Hoffer then reported to Hemlock what Hoffer had done, and Hemlock told Hoffer on what day Kay and Hebert would arrive in Nassau. They, together with Hemlock, Solomon, the notary, and Adessky arrived in Nassau on January 11, 1968; Hoffer, as directed, met them at the airport, and from there, together with Hepburn and Miss Neill, they went to the Board Room of the Nassau bank.

Solomon, who was a lawyer as well as a notary, handled the closings that day. He had prepared the documents in advance, leaving spaces to be filled in at the closing -- names, places of domicile etc. and this information was given to him at the closing.

Kay, as vendor (having just exercised an option he had to buy the property) executed a deed of the Sherwoode parcel to Columbia; Hepburn and Miss Neill executed it on behalf of Columbia (both parties were required to sign). The consideration was $105,000, but no money passed at that time -- Kay knew it was to come from the proceeds of the resale of the parcel by Columbia to Planinvest, which was to follow immediately, and did. The consideration paid by Planinvest to Columbia was $778,500. In the course of the closing, one Lefkowitz entered the room and presented (1) a certified check

for $778,500 from Planinvest to Columbia, signed by Maria, and (2) a copy of a resolution of the Board of Directors of Planinvest, certified by Maria, as President, appointing Lefkowitz to execute the deed as "Agent" for Planinvest. The check had been brought to the bank by Berman for certification, and after certification it was returned to him at the bank.

Hemlock had previously told Hoffer that Maria would not attend the closing -- she feared that her immigration status might be prejudiced if she left the United States -- and that her representative would appear, instead. Hoffer did not know Lefkowitz, but having officiated as notary when Maria executed her powers of attorney to her mother and her brother, Hoffer recognized her signatures on the check and the certification of the resolution.

Hoffer testified that he took no part in the closing; that it had been his responsibility, as Hemlock had instructed him, only to arrange for the time and place of the closing through Hepburn, and that he had done. As to the closing itself, said Hoffer: "That was not my part."

After the closing, Planinvest's check to Columbia was deposited in Columbia's ~~time deposit~~ checking account which Hoffer had previously opened in the Nassau bank.

Kay, Adessky and Solomon then requested the payments due them: Kay for the selling price of the Sherwoode parcel, Solomon for his fee, and all three of them as well as Adessky

for their expenses, for which Hemlock had promised to reimburse them. However, when Hemlock directed Hoffer to draw the checks out of the $778,500 deposit in the Columbia account, there ensued the conversation, described above, in which Latvis, the bank manager, said they could not draw against the Planinvest check, even though it was certified, until it cleared in New York -- which might take as much as eight days -- and Miss Reilly was dispatched to New York to get the clearance there without delay, and then to notify Latvis that this had been accomplished. Hoffer testified that he was present at the conversation in the bank; it had been between Hemlock and Latvis, and it was Hemlock who provided Miss Reilly with her transportation and money for her expenses. All those entitled to payments had to stay over in Nassau to await word of the clearance of the check (it was received by Latvis the following day) which they did at Hemlock's expense. The following day, Miss Reilly having evidently reported that the Planinvest check had cleared, Latvis permitted the desired withdrawals to be made from the Columbia account, and thereupon, at Hemlock's direction, Hoffer drew checks, to Kay for the balance of the selling price of the Sherwoode parcel, "approximately" $105,000 (he had already received the $5,000 "binder"), to Hepburn for his fee for setting up the corporations and attending the closing on behalf of Columbia, to Solomon for his fee and

expenses, and to Adessky, for his expenses. At Hemlock's direction, the balance remaining in the Columbia bank account was then transferred into three separate equal time deposit accounts, one over which Hemlock alone had power to draw, one over which Frank alone had power to draw, and one over which Berman alone had power to draw -- these three individuals being the owners, in equal proportions, of all the capital stock of Columbia.

These three time deposits having been created, the Columbia account over which Hoffer had had power to draw was exhausted. Hemlock then told Hoffer that the division was for part of the fee Maria owed each of them for what they had done in Spain.

During the closing, Solomon had asked Hemlock for the Certificates of Incorporation of Columbia and Planinvest. Shortly after returning to New York, Hemlock procured them and gave them to Hoffer to send to Solomon, and Hoffer did.

At the end of January, 1968, or early in February, Hemlock told Hoffer that there was to be another real estate transaction for a piece of property in Canada, this one to involve Splindian; that it was to be "similar in nature" to the Columbia transaction, and the proceeds would provide another portion of the fees earned from Maria in Spain. Hemlock instructed Hoffer to go to Nassau and arrange with Hepburn for the closing. Hoffer did so. A ~~time deposit~~ "checking" account"

was opened for Splindian in the Nassau branch, with power to Hoffer to draw on it. He told the bank that money would come later.

Hoffer then reported to Hemlock, who said he would be down "with the other people" the night before the closing. On the 4th, Hoffer picked up Hemlock, Kay (who was the broker in this transaction), Adessky (who represented Miss Comeau in this transaction), Solomon and Miss Comeau at the airport. On the 5th they went to the Nassau branch with Hepburn and Miss Neill, and there the closing took place. Solomon acted as the notary. Again he had prepared the documents in advance, leaving spaces to be filled in at the closing, and they were. Miss Comeau (who, as the testimony at the trial of the criminal case shows, had just acquired the property for $8,000 through Kay, as a broker, from a partnership of which Solomon was a member), conveyed her parcel to Splindian for $200,000, and Splindian immediately sold it to Planinvest for $361,000. Its check, signed by Maria, as president, had been brought to the closing by Lefkowitz, who also brought a copy of a resolution of the Board of Directors of Planinvest, certified by Maria, as president, authorizing him to sign for it, as its agent. The check had been presented to the bank for certification by Berman, and after its certification it was returned to him at the bank. Who had arranged for the meeting of the Board to pass its resolution, and for Lefkowitz to present it

with the check, Hoffer did not know.

At Hemlock's direction, Hoffer deposited the Planinvest $361,000 check in ~~a time deposit~~ the checking account which Hoffer had opened in Splindian's name in the Nassau branch. Then followed arrangements to expedite the clearing of the Planinvest check, by having Miss Reilly take it to New York, as she had with the check Planinvest had given Columbia on the Sherbrooke parcel transaction. In the meantime, however, Latvis permitted immediate withdrawals from the Splindian account against the Planinvest check, taking from Hemlock, as security, the time deposit created on the distribution of the Columbia account, on which Hemlock alone had power to draw. At Hemlock's direction, Hoffer then drew checks on the Splindian account to Miss Comeau for the purchase price of her parcel, and to Adessky, Solomon and Hepburn for the expenses of the closing, but, at Hemlock's direction, these checks were not to be deposited until after Planinvest's $361,000 check to Splindian had cleared.

Hemlock then directed the bank to transfer the $150,000 then remaining in the Splindian account into two separate, equal time deposit accounts, on one of which Hemlock alone had power to draw, and on one of which Berman alone had power to draw -- these two individuals being, in equal proportions, the owners of all the capital stock of Splindian.

The reason Frank did not participate in this distribution of the Splindian account was that he had previously

"withdrawn" from the corporation.

In June 1968, at Hemlock's direction, Hoffer went to Texas to arrange for a Mexican divorce by Mr. Dominguez from his then wife, and for his marriage, immediately thereafter, to Maria, who had been divorced from Luis. After Hoffer reported to Hemlock that the necessary arrangements had been made, Hemlock, Maria and Mr. Dominguez went down to Mexico, Dominguez got his divorce, and immediately thereafter married Maria.

During the late Summer and Fall of 1968, there were approximately six conferences at Maria's home in Forest Hills Gardens in reference to her tax problems. Those in attendance were Hemlock, Hoffer and a lawyer-tax specialist named Blumenberg, whom Hemlock had recommended to Maria. In connection with the resolution of these problems, Hemlock sent Hoffer to Spain to get information from Maria's lawyer there, one Fitzgerald. Hoffer reported by phone each day to Hemlock during that trip.

During the trial of the criminal case, Maria testified that at a meeting with Hemlock, at which she "believed" Hoffer was also present, she told Hemlock to "check everything" about the deal in Canada. Hoffer testified here that he was not at any meeting at which Maria gave Hemlock such an instruction.

Maria also testified at the trial of the criminal case that at a meeting with Hemlock, at which she "thought" Hoffer was present, she told Hemlock that she had learned he had been in Canada about buying property, and that she was "surprised", because she didn't know Hemlock had had anything to do with that. Hoffer testified here that he heard no such statement by Maria at any meeting he attended.

In her testimony before the Grand Jury, Maria made no reference to Hoffer, except to say he was not present at a conference to which she referred; similarly, in her testimony at the F.B.I., a transcript of which is in evidence, Maria made no reference to Hoffer. Again, in her conferences with an attorney she retained to bring civil suit for fraud in the Sherwoode and Comeau transactions, in which conferences, she testified in the criminal case, she told her lawyer "everything", she made no reference to Hoffer, and in her complaint in that action, she did not name Hoffer as a defendant or refer to him in the body of the document.

As far as Hoffer's activities in the office were concerned, Becker testified that in 1967 and 1968 Hoffer was the "commercial expert";"he handled all real estate, contracts and closings, . . . corporation work, forming corporations, stockholders' agreements". When asked if there was anyone else in the office "professionally equal" to Hoffer "in the

handling of real estate transactions", Becker answered: "Of course, I could speak for myself. I know I wasn't, and my observation of Mr. List and Mr. Hemlock was that they weren't".

Though Hemlock, List, Hoffer and Becker practiced law under the firm name "Hemlock, List, Hoffer & Becker" for several years prior to 1969, there was, in truth, no partnership until January 1, 1969. Up to that time, List, Hoffer and Becker were merely Hemlock's employees. The partnership agreement (Ex. Hoffer B), executed December 21, 1968, effective January 1, 1969, expressly provides (Par. 9) that "all files involving . . . or Dominguez" shall be "the exclusive property" of Hemlock "and any monies received on these cases shall be the property of" Hemlock. Reading the agreement as a whole, it is clear that, despite the Partnership Agreement, List, Hoffer and Becker continued to be, professionally, financially and otherwise, "glorified clerks", and Hemlock remained in complete control. As Becker testified here: "There is no question that Mr. Hemlock was in charge of the office. Ninety-nine percent of the business was brought in by Mr. Hemlock. . . . Certainly, in the last analysis, his wishes would prevail how he wanted a particular case handled. That would go from the inception through pleadings, trial, right up to the culmination of the matter. . . . He was solely in charge. . . from January 1966 [when Becker

~~formed~~ joined the office] up to the present time. . . . Mr. Hemlock continued to maintain the direction and the assignment of responsibilities in the office."

Hoffer testified that he did nothing on behalf of Maria, or her affairs, except when and as Hemlock directed; that he knew that anything he did in that regard would be part of his regular office work, as Hemlock's employee; and that he was not to receive, and did not receive, any remuneration except his weekly salary -- $275 to $300 a week -- as such employee; that he never was a stockholder or director of either Columbia or Splindian, and acted as Assistant Secretary to perform ministerial acts which Hemlock directed prior to the closings; that he never had any interest in either of said corporations, directly or indirectly; that he never received any part of the proceeds of the Sherwoode or the Comeau transactions, and never drew any checks against the bank accounts of either of them except those above referred to, to Kay, Comeau, Hepburn, Adessky and Solomon, which he drew as directed by Hemlock.

The learned United States Court of Appeals naturally laid stress on the identity of the distributees of the time deposit accounts, because they would be the ones who profited from the Columbia and the Splindian conveyances to Planinvest.

The Court said that "Hemlock, Hoffer and Frank" asked

the bank manager "to break the time deposits and pay them out in cash, which he did" and "Perhaps the most damaging evidence against them [Hemlock and Hoffer] was their personal participation with Frank in the breaking of the time deposits".

With great respect to the Court of Appeals, it was mistaken as to Hoffer.

I have referred above, briefly, to the time deposits and their disposition, but the importance of this subject justifies a more complete review of the testimony on it.

The only witness at the trial of the criminal case whose testimony dealt with the time deposits -- which was all the Court of Appeals had before it -- was Latvis, the manager of the Nassau bank from August 1, 1967 to November 1968.

Latvis testified that he did not know whether he, or an officer designated by him, opened the Columbia account -- "I don't have the records of the bank here" -- and "to the best of my recollection", it was a time deposit; further, that "to the best of my memory" the same individuals "associated" with the law firm of "Hemlock, Hoffer, I think it is Becker","were connected with another [time deposit] account, maybe one or two accounts, I am not sure of that" and the second with Splindian. Both deposits, he said, were "to the best of my recollection" on a ninety day basis.

After looking over those assembled in the courtroom at the criminal trial, Latvis testified that he could not identify any of those in the room as a person with whom he had the aforesaid transactions.

Latvis testified that "after a period of 60 days, maybe 30, I can't remember, we were requested to break the deposit period. . . . Then they requested us to pay out, and we did . . . in cash." He said he was "not clear in my mind" as to the amount of the deposits "perhaps from 300 to $600,000".

The foregoing is, I believe, a fairly complete resume of Latvis' testimony; he was not cross-examined.

Latvis' testimony, given without the aid of the bank's records, represented his recollection of events about six years in the past, and about five years after he ceased working in the bank. It is quite understandable, as he recognized, that, after such a length of time, his testimony might be inaccurate, or incomplete, as to some of the facts -- as, in truth, it was, in a very important respect, insofar as it relates to Hoffer.

The facts are these:

When the Sherwoode parcel was sold by Columbia to Planinvest, its check for the purchase price was deposited by Hoffer in the Columbia ~~time deposit~~ checking account which he had opened, and on which he had power to draw. As soon as withdrawals against that deposit were permitted, Hoffer, at Hemlock's direction, drew checks on said Columbia account to Kay, in payment of the purchase price of the Sherwoode parcel, and to Solomon and the lawyers in that transaction whose fees and expenses Hemlock had previously agreed to pay.

When the Comeau parcel was sold by Splindian to Planinvest, its check for the purchase price was deposited by Hoffer in the Splindian ~~time deposit~~ checking account which Hoffer had opened and on which he had power to draw. Hoffer then, at Hemlock's direction, drew checks on said Splindian account to Miss Comeau, in payment of the purchase price of the Comeau parcel, and to Solomon and the lawyers in that transaction, whose fees and expenses Hemlock had agreed to pay.

By direction of Hemlock, the balances then remaining in said Columbia and Splindian ~~time deposit~~ checking accounts, on which Hoffer had power to draw, were distributed as follows: From the Columbia account, one-third to each of three separately, newly created time deposits, i.e., Columbia 1, Columbia 2 and Columbia 3, on one of which Hemlock alone had power to draw, on one of which Frank alone had power to draw, and on one of which Berman alone had power to draw; and from the Splindian account on which Hoffer had power to draw, one-half to each of two separately, newly created Splindian accounts, i.e., Splindian 1 and Splindian 2, on one of which Hemlock alone had power to draw, and on one of which Berman alone had power to draw.

By the aforesaid transfers, the original Columbia and Splindian ~~time deposit~~ checking accounts on which Hoffer had had power to draw were exhausted, and from that time on, though there were five time deposits, Hoffer had power to draw on none of them. These last five are the ones which were "paid

out in cash", and Hoffer got none of it.

The foregoing is the substance of the evidence given at the hearing on the question of the time-deposit accounts. From some time prior to the commencement of the hearings, Hoffer had been trying, through Shearman & Sterling, the New York attorneys for First National City Bank, to get the Nassau bank to send up its records on the Columbia and the Splindian accounts. Matthew C. Gruskin, Esq., an associate in the office of Shearman and Sterling, testified that he had been, and still was trying to get the records from the bank's attorneys in Nassau, but had not yet succeeded, and that he would continue to try. On the last day of the hearings, the records not having arrived, it was stipulated that if the desired information were received by Shearman and Sterling in a letter from the Nassau attorneys, the letter should be forwarded to me and received in evidence as Hoffer Ex. N "with the same force and effect as if the contents were testified to here, and will constitute part of the record in this proceeding" (S.M. pp. 832-3).

During the morning of January 13, 1975, I received, by hand, a letter from Shearman & Sterling, by Matthew C. Gruskin, enclosing a cable received by them from Higgs and Johnson, "attorneys for First National City Bank in Nassau, Bahamas", with respect to the time-deposit accounts in the Nassau branch. The cable states that the attorneys

"have examined documents establishing and governing operations of bank accounts of Columbia Corporation Limited and Splindian Investments Limited and based on that examination we are able to advise as follows one Columbia Corporation maintained three time deposit accounts but Harry Hoffer was not authorized to sign for those accounts nor otherwise to draw on those accounts two Splindian Investments Limited maintained two time deposit accounts but Harry Hoffer was not authorized to sign for the accounts nor otherwise to draw on those deposits."

In accordance with the aforesaid stipulation, I have received in evidence both the cable and the letter transmitting it to me, and have marked them Hoffer Ex. N, and put them among the exhibits forwarded herewith.

Thus, the observation of the United States Court of Appeals that "Hemlock, Hoffer and Frank" asked the bank manager "to break the time deposits and pay them out in cash, which he did", and the Court's conclusion that "Perhaps the most damaging evidence against them [Hemlock and Hoffer] was their personal participation with Frank in the breaking of the time deposits", were misapprehensions as to Hoffer caused by Latvis' misinformation.

HEMLOCK

Hemlock gave the following testimony:

Late in August, or early in September, 1967, Hemlock received a telephone call from Berman, Hemlock's client some years previously. Hemlock described him as "a private detective" who had done some "investigating" and "surveillance" work for Hemlock in the past. On cross-examination he said

that Berman had twice been convicted of crime, once of unlawful wiretapping and once of burglary, for each of which he had served a brief prison term, and that he had lost his license as a private detective.

Berman told Hemlock that he, Berman, was then a "bodyguard" or "security man", employed by Frank, a District of Columbia lawyer, who represented Maria while she was in this country. Berman then put Frank on the phone, and he told Hemlock that he, Frank, had been an F.B.I. agent and a C.I.A. agent; that he knew Trujillo, and had worked for the family, for "many years"; that he was in New York with Berman and Maria, who had a problem which Frank did not know how to handle, and that he had not found anyone who could; that he was seeking other counsel, and he asked Hemlock if he would handle the matter. Pursuant to an appointment then made, Hemlock met Frank and Maria the following day at her suite in the Stanhope hotel; with her were her two young children, "a retinue", and Berman and Frank, who had an adjacent suite.

At that conference Hemlock learned that Maria had come here with her two sons in July; that she had a third child, a daughter, who was in Spain; that Maria's husband would not let her take all the children; when she went away, he required her to leave at least one of them with him, in Spain, as a hostage, to insure her return.

Maria had come here on a "medical visa", ostensibly to have surgery performed here, but she did not intend to have

any; her "main reason" was to engage counsel to help her get out of Madrid and come here with her three children and her "personalty". Hemlock testified that Maria was "very frightened" and "upset"; she said her marriage had been "a very unhappy one"; that her husband, Luis, had sought refuge in Spain -- her father had been a close friend of Franco's, and Luis had many "strong ties" with people in the Franco regime and that they had established their home in Madrid in about 1962, after her father's assassination. She said her husband was "a military man"-- he had been a colonel in her father's army -- and "very dictatorial"; that he was always armed and attended by two armed bodyguards, and had "threatened" her on many occasions; that he would not hear of separation or divorce because he had no property and, by the terms of an antenuptial agreement, he would get nothing if they separated or were divorced; that he and her brother, Ramfis, could not come here because both of them were considered "dangerous people" by the authorities here, having been convicted in the Dominican Republic of the murder of six or seven persons who were claimed to have assassinated her father.

Maria said that she and her mother owned a chain of department stores in Spain -- "El Aguila" -- and had given a few shares in it to her husband who was "head" of it.

She told Hemlock that her husband would often go to Barcelona on the business of the El Aguila stores, and that his bodyguards would accompany him.

Hemlock told them he was "interested", but could not think of a way out "at first blush"; that he wanted to think it over, and would talk to them the following day.

The next day Hemlock conferred with Frank. Frank told Hemlock that Maria was worth "over" $100,000,000; that her home in Madrid was a "museum"; there were four or five in help; the house was the largest single residence in Madrid, located on a road where a number of dictators from "banana countries" had established residences, and it was protected not only by guards, but by two or three dogs.

Hemlock told Frank that he, Hemlock, was "very interested" in developing a plan to get Maria's husband out of Madrid, so that, in his absence, Maria and the children could leave for the United States. Frank said he thought he could arrange for their entry here, if given time to do so. Hemlock said that he was "frightened" for his person and his safety in dealing with these "dangerous people" in their own bailiwick, and would have to give the matter some "real thought" before he would undertake it.

Maria left for Madrid early in September, 1967.

The following day, Hemlock told Frank that the plan would be to get Maria's husband to go to Barcelona on the pretext that he, Hemlock, representing a prospective buyer, wanted to discuss a purchase of the stores, and that while this went on in Barcelona, Maria would get out of Madrid with the children and her belongings. Hemlock testified that Frank said

it was "a great idea".

Hemlock testified that he spoke to Frank about a fee, and Frank's response was that Maria's possessions were tied up in two dozen interlocking corporations throughout the world -- Luxemburg, Spain, England, Panama, Switzerland, etc., -- many in "secret jurisdictions", where stock ownership was not disclosed, and that there were problems about the "illegitimates". Hemlock testified that he told Frank that he, Hemlock, was concerned about his personal safety, that he had told Maria the same thing, and that he had told her "it would cost a great deal of money", and that Maria had answered that she was "not concerned about money. You deal with Mr. Frank", and "you just help me". Hemlock testified that he told Frank "I wouldn't get involved in the situation unless I received a fee of $1,000,000" and Frank said that was "a little high"; that Hemlock then pointed out to Frank that if it were a mere "collection matter", the fee on $100,000,000 would be more, and that he, Frank, had found no one before who was able to get the job done; that he told Frank that Maria would need someone she could rely on to handle the situation in Madrid and bring her back, and Frank said he would need two people, himself and Berman, to tear out the telephones in the house in Madrid, and hold the people in the house incommunicado, and that would be "very dangerous".

Frank told Hemlock he would get back to Hemlock on the fee.

Hemlock testified that later that day Frank told Hemlock that Maria would "go along" with a fee of $1,000,000, "but that he and Berman would have to participate equally in the fee". Hemlock said he "protested", but finally he said "O.K., I agree". Hemlock testified that he told Frank that he, Hemlock, would like to see Maria, but Frank said that would "probably" be "impossible", because she was leaving "immediately" for Spain, and that "we would have to work this out in her absence". Hemlock testified he never told Maria of this splitting arrangement with Frank.

Hemlock admitted that "in a matter involving a $1,000,000 fee, it ought to be something more definite and evidentiary than a phone call or a private conversation across a table"; that he was "concerned" about it when Maria left "very quickly" for Spain, but "Frank was able to persuade me that I did not need anything in writing in view of the nature of the family and the type of people they were".

Hemlock testified:

> "Q Was this fee of a million dollars for yourself that you proposed? A I asked for a fee of one million dollars for myself, and Mr. Frank convinced me that the services would be dangerous and difficult for he [sic] and Mr. Berman, and it was agreed that the fee of one million dollars would be for the three of us, equally divided.
>
> Q Mr. Frank was an attorney? A Yes sir. To my knowledge he is still an attorney.
>
> Q But Mr. Berman was not an attorney? A That's right.

Q And you proposed splitting a legal fee with Mr. Berman? A I did not say it was a legal fee.

Q This was something separate and apart from your conduct as an attorney; is that correct? A It involved some legal work. I had my office form a corporation. I went out to Barcelona and acted in the capacity of an attorney representing a corporation interested in the purchase of the El Aguila stores, but a great deal of my work was not purely legal. A great deal of my work was negotiating and there were legal aspects to it, but I didn't consider this as a legal fee.

* * * * *

Q Did you regard yourself as doing something that was not legal work, but incidentally there was some legal service to be performed in connection with it, or did you feel the other way around, that you were acting as a lawyer and incidentally there were some other things to be done which were not strictly legal services? Which is it? A Actually, your Honor, I didn't really have any thought of how I regarded myself. I just considered it as a mission in which I was going to get a very substantial fee.

Q But you had been engaged as an attorney, had you not? A I had been consulted originally by Mr. Frank as an attorney, yes."

Hemlock testified that he knew Frank was not only one of Maria's lawyers, but that he was her "general factotum, running her affairs here", and in a "highly fiduciary" relation to her. He testified:

"Q Didn't you think there was some sort of conflict of interest on Mr. Frank's part when he is to determine the amount of a fee to be paid to you, of which his client is to be the payor, and he is to have a share? A No, I did not.

Q And you do not think at this point that there was a conflict of interest on his part? A Well, at this point I don't know what to think, in view of

what transpired on September 24th. But at that time I did not feel that. It seemed to me, Mrs. Leon had the utmost confidence in Mr. Frank, and he had represented the family for nigh on twenty years, and I didn't think there was any conflict.

Q Doesn't it seem to you where a person is in a position to fix the amount of a fee in which he is to share, a fee to be paid by somebody he sustains a fiduciary relationship with, that there is a conflict of interest? A. No, sir. As long as there is consent between the parties. I felt there was a consent between he [sic] and Mrs. Leon.

Q It was true, was it not, that to the extent that the fee was increased, his share would be increased? A Certainly.

Q And you don't think that creates a conflict of interest? A No, sir. I didn't think he would be doing anything but negotiating a fair fee with Mrs. Leon. And if he shared in it . . .

Q I get back to the point that whatever he negotiated for, every dollar he increased it, he got a third, didn't he, himself? A Yes, he did, sir.

Q And you do not think there is any conflict of interest where he is the attorney for the person who is to make the payment? A None whatever. And, as a matter of fact, if I may, your Honor, in these circumstances I asked for a million dollars myself. It was Mr. Frank who said that that is too large a fee. So he was actually negotiating on behalf of Mrs. Leon to reduce the fee, not increase it.

Q Mr. Frank was in the employ of Mrs. Leon, was he not? A Yes, sir.

Q He was getting paid by Mrs. Leon, was he not? A Yes, sir.

Q If he were to get paid for services performed in Spain, however serious or difficult they may be, wouldn't it be her obligation to pay him for his services? A There was a suspicion. I did not anticipate this was part of services that he would have rendered. He was engaged to find somebody to take care of this mission.

Q But then he was also to go to Spain with you, was he not? A Sure.

Q And so was this other man, Berman? A Yes, sir.

Q And the reason that they felt they should be paid was that this was to be a very dangerous trip? A Yes, your Honor.

Q And the danger was in performing a service for Mrs. Leon, wasn't it? A Yes.

Q Why should not she have paid them for their dangerous service? A She understood, as far as I understood from Mr. Frank, that the three of us were going and that the three of us would be paid.

Q But you never had any confirmation of that from her? A None whatsoever.

Q You had merely a statement of one of the men who were going to be in on the divvy that it was agreeable to her, did you not? A Yes, your Honor.

Q And you felt that was sufficient? A Yes, your Honor.

Hemlock also testified -- referring to Frank and Berman:

"Their services as her employees were over when she left this country and they became part of this mission which was my creation."

* * * * *

"They were working on an assignment which was to be handled by three people, myself, Frank and Berman for $1,000,000, and I did not consider myself an employee. I considered myself a sub-contractor [and] they became contractors with me."

Hemlock testified to the same effect as Hoffer did about Hemlock's instruction to Hoffer to have Arthur Anderson & Co., through their Barcelona office, arrange for a meeting

between Hemlock, as the representative of a prospective purchaser, and Luis, to discuss the purchase of the Barcelona store; to arrange to have Anderson-Barcelona make a "pre-purchase" audit of the store; and to retain counsel in Barcelona who would sit with Hemlock during the conferences between him and Luis.

Hemlock testified that with the approval of his friend Modell, of the Modell Stores (which, Hemlock said, were worth between thirty and fifty million dollars), Hemlock formed a New York corporation, with power to buy department stores in Europe, so as to have a "legitimate appearing entity" which would be "believable" by Luis as the potential purchaser. Hemlock testified that he took instruction from Modell, and read books, about department store operation and management, so as to be able to discuss the proposed purchase intelligently with Luis.

Early in September, 1967, Frank provided Hemlock with $5,000 for expenses of his trip to Barcelona, and Frank got $10,000 for his and Berman's expenses on their trip to Madrid. Frank told Hemlock at that time that Maria had "little money" in this country, she having spent $250,000 since July.

Arthur Anderson & Co. having reported that the desired arrangements had been made in Barcelona, Hemlock, together

with Linda Riera, a Spanish interpreter he had engaged, went to Barcelona, on September 9, 1967.

Frank and Berman went to Madrid; Hemlock knew the hotel at which they would be stopping there.

Hemlock engaged rooms at two hotels in Barcelona, so as not to stay at the one at which he would tell Luis he would be, and hired cars to be close by "at all times" so that, "if anything happened we would be able to immediately leave the premises and get out of there."

The following day, Hemlock, with a representative of Arthur Anderson & Co. and Miss Riera, met Luis and his "chief manager". Hemlock noted that Luis and his manager were armed. Negotiations continued throughout the morning and resumed in the afternoon. Hemlock kept in touch with Frank and Berman in Madrid during breaks and in the evening.

In the course of the negotiations the following day, Hemlock received a message, left for him by Frank and Berman at their hotel, that they had left Madrid, and that he could leave any time he wanted. Respondent testified that he left the conference with the statement to Luis that Anderson & Co. would continue the pre-audit "work up", and he would leave to keep other commitments. His bags were all packed at his hotel; he picked them up, and he and Miss Riera went to the Barcelona airport, where he took a plane leaving for London in ten minutes; Miss Riera went to visit her family in Barcelona.

Hemlock testified to the same effect as Hoffer, that

while Hemlock was in Barcelona, he gave Hoffer instructions to have cars at the airport and hotel accommodations, ready for Maria and her children under the name "Lopez", and for Frank and Berman, on their return.

On the day after his return, by which time Maria was back, i.e. about September 15, 1967, said Hemlock, he asked Frank when he, Hemlock, would be paid and Frank answered: "Take it easy. I'll handle all of that . . . She doesn't have money immediately in cash . . . give her a little time to settle and have funds transferred."

Shortly thereafter, Frank asked Hemlock to prepare a letter -- "he didn't have his law office present" -- for Maria's signature to the Bank of London, about transferring interest on time deposits to Maria's bank account in New York. Hemlock prepared the letter on his office stationery and signed it; Maria signed it on behalf of Planinvest, as president. The letter directed the bank "until further notified" to send all bank statements for the account and communications to Hemlock, at his office address. The reason for this, said Hemlock, was that Maria was going to be moving in and out of hotels until she was sure her husband would not do anything "drastic". This instruction was revoked within a week or two, and Frank and Berman, and their address, were substituted; in or about November, when Maria bought a home in Forest Hills Gardens, her name and address were substituted.

Hemlock corroborated Hoffer's testimony about Maria's

purchase of the home in Forest Hills Gardens, and Hoffer's passing on the documents and taking care of the closing, on Hemlock's instructions. Hemlock testified that, at Frank's direction, he organized a corporation -- Ameri-View -- in whose name title was taken, and Hemlock testified that Maria went to a bank with Frank, where she raised a $125,000 mortgage on the house on the security of $2,000,000 of Philadelphia Fund stock held by Planinvest through another corporation. Hemlock testified that Maria spent over $1,000,000 in decorating and remodeling the house, using decorators and architects who had been recommended to her by Hemlock.

In October or November, Hemlock testified, he spoke to Frank about the fee. Hemlock had still received nothing. Frank's response, according to Hemlock, was: "She's getting settled. I'm dealing with her brother and her advisors in Spain." Hemlock testified that he felt he was getting "a bit of a run-around".

On another occasion, Hemlock testified, he urged Frank to "let her [Maria] take care of No. 1, me", and Frank's answer was: "Take it easy, she doesn't have the kind of money to pay us, and I am concerned about her tax problems and her corporate status. . . and as soon as we get clearance as to what corporation and how to pay us, they will pay us. But just keep cool." Hemlock testified that during this period, Maria spent $40,000 on fur coats, "and I became incensed that

she is spending this kind of money, and I'm getting nothing". However, said Hemlock, "I never had any discussions with her during that period of time about my fee."

In November 1967, said Hemlock, he was "pushing" for his fee, and Frank said that Maria's Spanish attorneys were "concerned" with problems she might have in paying the fee "directly"; that Planinvest could not pay a debt owing by Maria personally. Hemlock told Frank he wanted "action", and Frank said: "Let me handle it. I'll take care of it."

Finally, said Hemlock, Frank said Maria wanted to pay through Planinvest, and she wanted it done outside this country. Frank told Hemlock to go to Canada and find land to be bought by Frank, Berman and Hemlock; that Maria would buy it from them "and all we would have to do would be to increase the price by $1,000,000" and "we" would be paid "each one-third of our $1,000,000 fee".

Hemlock testified that in "about December" he phoned Maurice Hebert, an attorney he knew in Montreal, and told Hebert that he, Hemlock, knew someone who was interested in buying land in Canada; that thereafter he had Hoffer accompany him to Montreal, and at Hebert's office he introduced Hemlock and Hoffer to Kay. Hemlock told Kay that he, Hemlock, was interested in a piece of land between $200,000 and $300,000, and Kay brought up the Sherwoode parcel.

On returning to New York, Hemlock reported the above

to Frank. A day or two later Kay phoned, gave Hemlock a metes and bounds description of the Sherwoode property, and said it was "listed as $115,000". Hemlock reported this to Frank, who said he would "check it out"; two days later Frank told Hemlock: "The land seems all right. It seems worth the price, but see if you can knock him down". Hemlock phoned Kay, got him down to $105,000, and reported this to Frank. He said he was "delighted", and told Hemlock to "Go through with the closing, and you, Berman and myself will purchase it and then sell it to Planinvest, her Luxemburg corporation".

Hemlock, with Hoffer, then went to Canada, where they met Kay's attorney, Adessky. From there on, except for a few matters to which I shall refer below -- matters to which Hoffer did not refer, they being things he probably would not know about -- Hemlock's version of the proceedings, to and including the closing of the bank accounts in Nassau, is the same as Hoffer's, previously discussed.

In addition to the foregoing matters, on which Hemlock and Hoffer were in accord, Hemlock testified that when Frank told him to go ahead on the Sherwoode parcel, he told Frank that a check would be needed for about $1,300,000 to include the $1,000,000 to be left over for payment of the fees; that Frank said "O.K.", but later called and said Maria would not be able to provide more than $750,000 to $800,000 toward the fees. Hemlock testified that he said, "I want my $333,300 plus reimbursement of expenses . . . and you

wait for your money; it's your client"; that Frank objected and said he would get Hemlock a check to cover the acquisition cost and expenses plus $650,000; that Maria would be able to "free up the balance in a month or two, and we will have another land transaction".

Hemlock testified that he did not know Lefkowitz, but that he, Hemlock, was the one who arranged with Frank to have an agent at the closings to execute the deeds on behalf of Planinvest, and to bring the Planinvest checks and resolutions; also that he was the one who promised Solomon, the notary, to supply the documents which Solomon asked for at the closings.

Hemlock testified that after the payment to Kay and Miss Comeau of the purchase price of Sherwoode and the Comeau parcel, respectively, and to the lawyers and Solomon of their fees and expenses, the balances in the Columbia and the Splindian accounts were, at his direction, transferred to three separate time deposit accounts, on one of each of which Hemlock, Frank and Berman, respectively, had sole power to draw.

Hemlock testified that he asked Frank for the $118,000 still unpaid after the distribution of the proceeds of the Sherwoode closing, and a short time later Frank said Maria was ready to pay it; that Hemlock then got in touch with Kay and, with Frank's approval of the terms, worked out the Comeau transaction. When Hemlock told Frank that Hemlock would need

about $561,000 for the closing, inclusive of their fees to be taken out, Frank said, according to Hemlock, that Maria had only between $350,000 and $400,000. Hemlock testified that he "protested" he should get the full amount still owing to him, and Berman would want his; that Frank agreed he would not participate: "It's my client and you two can split the difference".

Hemlock testified that he then called Hoffer and told him that Frank had "withdrawn" as a stockholder and an officer of Splindian.

Hemlock testified that he then arranged for the Comeau closing at $200,000, and, after paying the cost and expenses of the acquisition, he directed the transfer of the balance remaining in the Splindian account to two separate time deposit accounts, one on which he alone would have power to draw, and on the other of which Berman alone would have power to draw.

Hemlock testified that this left about $40,000 due him for his share of the fee; that he asked Frank for it, and Frank replied: "Don't worry about it; let me handle it." As will appear below, Hemlock did not get it, and never will.

Hemlock testified, as Hoffer did, to Hemlock's sending Hoffer to Texas, to arrange for Dominguez' divorce from his then wife and the ensuing marriage of Dominguez to Maria, who had been divorced from Luis; also to Hemlock's trip to Mexico to be with the newlyweds when these new relationships

were effectuated. Hemlock testified that on that occasion, and before the wedding, he drew an ante-nuptial agreement between them. His bill for the trip was $2,000 plus his expenses.

Hemlock testified, as Hoffer did, to the meetings in 1968 at Maria's home in Forest Hills Gardens, to the conferences there with her and Blumenberg in reference to her taxes, and of his sending Hoffer to Spain to consult with Maria's attorney there in reference to tax problems. Hemlock testified that Maria paid Blumenberg $10,000, of which he gave Hemlock half, as they had agreed he should, because "I was doing the leg-work and attending every meeting".

Hemlock testified that at one of said five or six meetings at Maria's home, she said: "Your name was being used in Canada," to which he replied: "My name wasn't being used; don't you know I am one of the owners of those corporations in Canada and that I handled the transactions?" and she said: "The land isn't worth the price." Hemlock testified that he answered: "You've got to be kidding. I smell a rat" -- meaning, testified Hemlock, that "either she is kidding me or somebody is kidding me; either Frank is giving her a story or she is giving me a story" -- and that he said he wanted to meet with Frank and Berman "immediately". The conference then went on about Maria's taxes.

Hemlock testified that he called Frank and Berman the next morning, told them what had happened, and said he wanted

a meeting in his office "immediately" with "everybody". The meeting was held at Hemlock's office four days later -- September 24, 1968 -- that being the earliest day he said he could get them all together. Hemlock had telephoned Maria to come, and asked her not to bring her husband, his reason being, said Hemlock, that she and Dominguez had not been married at the time of the occurrence of the matters to be discussed, and there might be "emotionalism". However, Marie said her husband wanted to come "and I said 'O.K. bring him.'" Frank and Berman came, and a few minutes later Maria and her husband arrived. Hemlock asked him not come into the conference, and he didn't. Hemlock testified that when Frank, Berman and Maria were assembled with him in his office, he said: "I want to know what this is all about; Frank and Berman said to Maria: 'You know what this is all about, and you know a portion of the money was used to pay off the CIA with regard to the assassination of your father'", and Maria answered: "I don't know that at all. It's a lie" and "I want my husband to hear it". Hemlock testified he then went out and brought Maria's husband into the conference room; that Frank and Berman said "You know all about this", and walked out; that Maria then asked Hemlock to repeat to her husband what Frank and Berman had said, and Hemlock did so; that Maria and her husband left, and, said Hemlock: "I never saw them again."

Hemlock testified that he called Frank and Berman after the meeting, and they said: "She's full of baloney; she

knows everything"; that "it all has to do with her husband", and, said Hemlock, "that's all they would tell me"; they said "there's nothing to talk about".

Hemlock testified that when Frank and Berman gave their explanation at the September 24th meeting, he was "baffled"; "shocked"; that "All I said was 'I don't know what's going on here.'" He testified: "I don't know whether Frank had used some of the money to pay off the CIA, or what he had told her. I did not know if it was a play-act for the husband." He also testified it was not "necessarily" correct to say Frank was not telling the truth; "I really didn't understand what was going on and didn't, in fact, I don't know today whether, in fact, Mr. Frank and Mr. Berman had anything to do with an assassin. . . . I do know that no portion of my money was ever to go for paying off an assassin or anything or any story like that."

Hemlock testified that Hoffer never owned any stock in either Columbia or Splindian; that he was never on "their bank accounts" "except for a moment" when he opened them; that no one in Hemlock, List, Hoffer and Becker had any interest -- "not a penny" -- in any fees received or to be received from Maria; that whatever Hoffer did he did as part of his regular office work, as Hemlock's employee, for which he was to receive, and did receive, only his regular weekly salary.

Referring to Maria's testimony at the trial of the criminal case, that she told Hemlock "to check everything" in reference to the Canadian purchase, Hemlock testified that he never was so instructed by her: "Never, never, whatsoever."

Hemlock testified that he never wrote, or spoke, to Maria about the fee, or the amount of it owing from time to time, except in his early conversation with her, when they were discussing whether or not he would get into the matter, he told her that if he did his fee would be "enormous". The failure to discuss the amount of the fee with her, said Hemlock, was not because she was aloof or unapproachable; on the contrary, Hemlock testified that she was always accessible to him, either personally at her home or over the telephone, and their relations were so informal that he called her "Angeleta". Hemlock said he did not feel there was any necessity for confirmation by her; that there was no time, and he accepted Frank at face-value when Frank told him that he, Frank, had spoken to Maria about the fee and she had confirmed the $1,000,000. This, I assume, refers to the conversation in which, as Hemlock testified, after Frank told Hemlock that Maria had approved the fee, he said to Frank that he, Hemlock, wanted to see Maria, and Frank replied that that would probably be impossible because Maria was leaving immediately for Spain.

Hemlock testified that two or three weeks after the September 24th meeting, attorneys representing Maria phoned him and said they wanted to see him. They "inferred", said Hemlock there had been fraud, and there would be civil and criminal repercussions. A week or so later, Hemlock testified, he went to the attorneys' office and they asked him what he was going to do about the situation, to which, he testified, he replied: "Nothing, I did nothing wrong and nothing to be guilty about or to pay anything."

In May, 1969, the attorneys brought suit on behalf of Maria in the Federal Court here, alleging fraud in the Canadian transactions, and demanding judgment for $1,000,000 as compensatory damages and an additional $1,000,000 as punitive damages. The defendants in the action were Hemlock, Frank, Berman, Columbia and Splindian. Hemlock testified that he did not answer the complaint because Maria had failed to comply with an order he got for her examination, and that it was his intention, when he did answer, to assert a counterclaim for the $40,000 still unpaid on his fee.

As the hearings in these proceedings were about to conclude, Hemlock's counsel reported that a stipulation of settlement of Maria's civil action had been signed and was about to be submitted to the Court; that Maria's lawyers were claiming that the judgment of conviction created a conclusive estoppel against the defendants there; and that it was the

consensus of defendants' counsel that, in view of the language in the opinion of the U.S. Court of Appeals on affirmance, all that would be left, if there were a trial, would be an assessment of damages.

In his charge to the jury, District Judge Pollock had told them that a criminal conviction "does not support a subsequent civil judgment in a case of this sort. . . . That is to say, if the defendants are convicted in the criminal action, the plaintiffs in the civil suit will still have to prove their entire case for damages before a new jury or judge and could in no way rely on defendant's prior conviction to sustain their claim".

On appeal, the Court of Appeals held that "a conviction here will operate as collateral estoppel in favor of Mrs. Dominguez in her civil suit . . ."

The Court of Appeals noted that in S. T. Grand v. City of New York, 32 N.Y.2d 300, the New York Court of Appeals had held that

> "under modern principles, a criminal conviction is conclusive in any subsequent civil action as to any issues necessarily determined against the defendant in the criminal case,"

and that Judge Pollock's aforesaid instructions "were thus in error".

Nevertheless, the United States Court of Appeals held that, in view of all the circumstances, "this single slip does not require reversal" -- and the Court affirmed.

By the terms of the stipulation of settlement of Maria's civil action, Hemlock will pay Maria $47,000 and waive any claim for the balance of his fee, and Frank will pay Maria $31,000; no payment is provided for in the stipulation by Berman.

Hemlock testified that he believes Frank is in Washington and Berman is in Vermont, and that he, Hemlock, has not been in touch with them since the September 24, 1968 conference, except in connection with the aforesaid stipulation of settlement of Maria's civil action.

OPINION

HEMLOCK

In my opinion, Hemlock's testimony quoted above (pp. 54-57) was a tissue of shifty, misleading improvisations; for example: his statement that sharing his fee with Berman was not the sharing of a legal fee with a layman, because the fee he was to receive would not be a legal fee; because this was a "mission" on which he would be a "contractor" and Berman would be a cocontractor"; his statement that there was no conflict of interest on Frank's part in arranging to take, and in taking, a part of Hemlock's fee, because Frank was really saving money for Maria, by having Hemlock absorb what would otherwise be Maria's obligation to pay Frank and Berman; the startling non sequitur that there was no conflict of interest on Frank's part because Maria had "the utmost confidence in Frank and he had represented the family for nigh on twenty

years"; the statement that he "felt" Maria had consented to the split because he was told so by Frank, "one of the men who were going to be in on the divvy".

Hemlock's statement that Frank and Berman ceased to be Maria's employees when she left for Spain was, as Hemlock knew, untrue. There is no suggestion that they had resigned, or that Maria had discharged them, prior to her departure. On the contrary, they were to join her there -- she even paid their traveling expenses ($10,000) to Madrid, and they were to continue, over there, to perform for her precisely the same type of service -- "security" -- as they had performed for her here and for which she would have even greater need over there than she did here. Indeed, as Hemlock testified, he pointed this out to Frank in discussing with him what his duties abroad would be. But that is not all. Maria was not interested in providing them with an opportunity to enjoy the delights of Spain; she needed, and wanted, them to protect her over there while she gathered her children and her possessions, and during the journey back here. Frank told Hemlock that he would be able to facilitate her entry here. It was an essential part of their employment that they remain with her until that mission was accomplished, not to mention the continuation of their services for her after her return, as they did. No one would seriously suggest that they were unemployed between the time they left here and the time of their arrival in Spain, or that Maria rehired them after they

got there.

Hemlock's statement that there was no "time" in which to get an acknowledgement of his fee by Maria is unbelievable. There were innumerable opportunities; moreover, as Hemlock admits, he could have created the opportunity any time he wished: Maria was always accessible to him, either personally in her residence, or over the telephone, and their relations were so easy and informal that he called her "Angelita".

Hemlock's statement that he accepted Frank's assurance that no confirmation by Maria was necessary "in view of the nature of the family and the type of people they were" is incredible. If there was any "family" whom no one would trust, it was the family of the notoriously corrupt Dictator of the Dominican Republic; and here was his daughter, with $100,000,000 of what her father had gouged out of his oppressed, poverty-stricken, hapless subjects, and which she was concealing by all manner of artifice and stratagem -- all in violation of a Decree of the Dominican Republic, of which she was still a citizen, requiring its return. And quite apart from "family" and "kind of people they were", Frank's promises and assurances had proved hollow time and again -- Hemlock referred to one of them as "a bit of a run-around" -- and yet this seasoned lawyer made no attempt to get a written confirmation of a $1,000,000 retainer.

It is inconceivable to me that when Frank declared himself and Berman "in" for $666,666 of Hemlock's $1,000,000 fee, Hemlock would, with nothing more than a mild "protest", say "O.K., I agree" -- unless there were more to it than Hemlock has told us, and in my opinion there was. I believe Frank made it a case of "Split, or else" -- the "or else" being a threat to have Maria get other counsel, which Hemlock knew Frank was in a position to do. In short, in my opinion, Hemlock's relinquishment of two-thirds of his fee to Frank and Berman was a kick-back to insure that they would not only refrain from interfering with Hemlock's getting the retainer, but would actively cooperate to preserve and continue it; a third of a loaf was better than none at all.

In my opinion, Hemlock's reaction to Frank's and Berman's disclosure that they had used part of the profits of the Sherwoode and the Comeau transactions to pay off C.I.A. agents, though slightly stronger than Maria had described it at the trial of the criminal case, was still what the United States Court of Appeals had characterized as "bland" in the face of a "revelation . . . that would have caused an honest lawyer to erupt in fury".

Maria came here to find a lawyer who could deliver her and her children from Luis, and she thought she had found that lawyer in Hemlock. The mission would require great ingenuity, be time-consuming, and fraught with serious danger to him.

She knew, of course, that no lawyer would undertake it unless he had first been retained by her, and that the retainer would be substantial in amount.

Maria's testimony at the trial of the criminal case covers upwards of three hundred printed pages of the appendix on the appeal, but nowhere did she say a word about having retained Hemlock, or even of having spoken to anyone about doing so.

According to Hemlock, he told Frank: "I wouldn't get involved in the situation unless I received a fee of $1,000,000."

Hemlock knew that the mission would be a difficult one and hazardous. Experienced and astute lawyer that he was, he must have given thought to how he would establish his claim if Maria should dispute it. Even if he came back and would testify, it would be difficult enough, without a written retainer from Maria. Certainly neither Hoffer nor Becker could testify: their testimony would be hearsay; Frank could not be relied on: even if he were willing to testify, which was doubtful, he would not be able to testify because of the attorney-client privilege. And Berman? Even if he would be willing to testify -- which was unlikely -- who would rely on a man whose detective license was taken away, and who had a "police record" of two convictions and prison sentences? Thus, Hemlock knew that even if he were here, his chances would be slim -- his uncorroborated, highly implausible claim of a promise to pay him $1,000,000, against Maria's denial,

and possibly testimony corroborating hers.

How, then, does one explain the failure of a clever and sophisticated lawyer like Hemlock to get a writing in a case involving a $1,000,000 fee?

The reason, in my opinion, was that although Hemlock must have known that Frank had discussed the retainer of Hemlock with Maria, he doubted that Frank had told her the amount would be anything in the magnitude of $1,000,000, but in any event, even if Frank did tell her, Hemlock was certain that Frank had not told Maria that Frank and Berman had arranged to cut themselves in for $666,666 of it. I believe that Hemlock realized that any conversation with Maria about confirming the amount of his fee would involve him in a disclosure of his and Frank's disloyal machinations, and would be, for him, a leap from the frying pan into the fire. I believe that, knowing Maria's great wealth, and the volume and diversity of her financial transactions, and knowing Maria's blind confidence in Frank, Hemlock concluded that it would be the better part of discretion for him to sit it out in silence and trust that Frank's resourcefulness and self-interest would invent a way to finagle Maria into paying the fee -- as, in fact, he ultimately did.

In my opinion, Maria had not been informed or consulted, and she did not approve, the Kay-Columbia-Planinvest conveyances, or the Comeau-Splindian-Planinvest conveyances,

or any part of them, and she did not know of them, or their terms, until months after the transactions had been consummated. They were, in my opinion, a fraud on her, in which Hemlock participated.

In my opinion, respondent Hemlock has not overcome the presumption of guilt created by his conviction in the criminal case.

HOFFER

There is no evidence that anything Hoffer said or did was, per se, fraudulent or unprofessional. Hoffer did not participate in the conception or the formulation of the fraudulent plan, and he made no false or deceitful statement to anyone about it; he had no financial interest in Columbia or Splindian, and he did not profit, or ever expect to profit, from the plan or its effectuation; he was not a stockholder or a director of either corporation, and never held in either of them any office in which he exercised discretion;* he arranged, through the local attorney in Nassau, for the place of

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*When Hemlock sent Hoffer to Nassau to make ready for the anticipated title closings, one of the assignments Hemlock gave Hoffer was to open bank accounts for Columbia and Splindian in Nassau, so they would be available when needed. There was no money for deposit at the time, and there would be none until the proceeds of the closings were in hand -- at which time Hemlock would be present and take control, as, in fact, he did, completely. To open the accounts, Hoffer had to be an officer, and, at Hemlock's direction, Hoffer was designated "Assistant Secretary".

holding the closings; he was at the closings, but did nothing at them [everything was handled by the notary]; he opened bank accounts, to have them available after the closings, when funds would come in; he drew Maria's powers of attorney and handled the title closing of her Forest Hills Gardens home; he went to Texas to make arrangements for Mr. Dominguez' divorce and the following marriage to Maria, and he sat in on conferences in reference to Maria's tax returns. The statements in the opinion of the learned United States Court of Appeals to the contrary notwithstanding, there is no doubt that Hoffer had no interest in any time-deposit account, and he did not receive any part of them when they were paid out; and Hoffer never received, or had any expectation of receiving, any compensation except his regular weekly salary as Hemlock's employee.

Hoffer testified that Hemlock told Hoffer, and Hemlock confirmed it, that Maria had approved the fee and the plan for paying it.

The question is: Should Hoffer have believed what Hemlock told him?

One might argue that the great excess of the amounts for which the parcels were sold to Planinvest, over what had been paid for them, should have raised a suspicion in Hoffer's mind that the transactions were frauds on Maria. Such an argument would be elliptical: if it was Maria's intention, by these purchases and sales, to create a fund sufficient to pay

the fees, the creation of the excess would have been the very purpose of these purchases and sales. So one would get back to the question: Should Hoffer have believed Hemlock's statement that Maria had approved the fees?

This question is not to be equated with the question Hemlock faced when Frank told him that Maria had approved the fees.

Frank's disloyalty to Maria in making the kick-back arrangement with Hemlock, and Frank's villainy in extorting it from Hemlock, could have left no doubt in Hemlock's mind that Frank was a disreputable scoundrel, unworthy of belief. On the other hand, Hemlock had been Hoffer's employer for five years, and there is nothing to suggest that in all that time Hemlock had done anything to create even a suspicion in Hoffer's mind that Hemlock would lie to Hoffer about the fee.

When Frank told Hemlock that Maria had approved Hemlock's fee, the amount was to be $1,000,000; the business of splitting it did not arise until later. At the time, Hemlock told Hoffer that Maria had approved Hemlock's fee, it was $333,333; Hoffer knew by that time that $333,333 was all that would come to Hemlock.

The case was one justifying an enormous fee. From the lawyer, it required ingenuity, time and physical risk. To Maria it was a boon beyond price: the liberation of herself and her children from Luis, and the rescue of millions of dollars

of money and securities. Considering Maria's fabulous wealth, and what she had at stake, it is my opinion that Hemlock's statement to Hoffer that Maria had agreed to pay Hemlock a fee of $333,322 need not have caused Hoffer to suspect, and in my opinion it did not cause him to suspect, that his employer was engaged in a scheme to defraud Maria, and that he, Hoffer, was furthering it.

As I observed Hoffer, and listened to him, as he testified, I was impressed by two things: first, that he is a straightforward, honest, trustful, even naive, person, without guile or cunning or evil, and second: that he had held Hemlock in such respect and awe during the period here involved that suspicion of him never entered Hoffer's mind.

In my opinion, by the testimony in these hearings, none of which was before the criminal court, the respondent Hoffer has overcome the presumption of guilt created by his conviction in the Federal Court.

Schedule A, hereto annexed, "BIOGRAPHICAL", and Schedule B hereto annexed, "CHARACTER EVIDENCE" are part of this Report and Opinion.

New York, January 24, 1975.

Respectfully submitted,

GEORGE TROSK,
Referee

SCHEDULE A

BIOGRAPHICAL

HEMLOCK

This respondent gave the following testimony:

Respondent was born in New York City on February 19, 1933. After attending public school and high school -- in both of which he was Number 1 in his class and valedictorian -- he attended City College, from which he was graduated with the degree of Bachelor of Arts. Immediately after his graduation, respondent received a State scholarship, but was refused admission to Columbia Medical School because of his youth. He then enlisted in the Army, as a private, and after about two years of camp training he was honorably discharged as a Private First Class. Respondent then went to New York Law School and, under a Veterans' Program, was permitted to take a summer course, thereby enabling him to complete the regular three year course in two. Again he was "Number 1" in his graduating class.

During his last year in law school, respondent worked in a law office as a clerk and errand boy. Upon graduating from law school, respondent took, and passed, the Bar examination and, in 1957, was admitted in this Department. The day he was admitted, respondent left the firm by which he had been employed, and opened an office at 305 Broadway, New York City; he remained there for four or five years, during which time he

took on an employee named List. Respondent then moved to an office at 250 Broadway where, in about 1965, he took on another employee, the respondent Hoffer. In 1966 he employed Becker.

As of January 1, 1969, respondent entered into a formal written partnership agreement with List, Hoffer and Becker under the name of "Hemlock, List, Hoffer and Becker". I say "formal partnership" because these same four individuals had been practicing for some years prior thereto under the name "Hemlock, List, Hoffer & Becker" although Hemlock was a sole practitioner and the others were his employees. List died in 1973, and the survivors have continued to practice law under the same firm name.

Respondent is a member of the New York County Lawyers Association and the Trial Lawyers Association; he is an attorney on the panel of the Federation of Jewish Philanthropies, and the unpaid counsel to his Temple and its Rabbi.

In 1964 or 1965, Mayor Wagner appointed respondent, at a dollar a year, on the Commission of Physical Fitness of the City of New York, part of a national commission, and respondent continued to serve in that capacity during part of the Lindsay administration.

Respondent has a daughter who is at Tufts, and whom it had been his intention to make a member of his firm.

Respondent testified that even incarceration and separation from his daughter would not be as great a blow to

him as the loss of his license to practice law for even a day. He said that he "loves the law" and loves it with a "passion", and that his right to continue to practice law "is more precious than any other thing in life". The last two years of his life, he said, have made "a tremendous change" in his life; they have been "hell".

Respondent has never before been the subject of a disciplinary proceeding.

HOFFER

Respondent Hoffer gave the following testimony:

Respondent was born June 16, 1933. He majored in Accounting at C.C.N.Y., from which he was graduated in 1954 with the degree of Bachelor in Business Administration. In that year he was drafted, and after two years in service, most of it in Japan, he was honorably discharged in January 1956 as a Private First Class.

Respondent attended Law School at night, while working during the day in an accounting office. In 1961 he was graduated with the degree of LL.B. He continued to work at accounting until 1963, when he entered the employ of Hemlock, then a "sole practitioner", at a salary of $125 a week, plus a share of fees received by the office from matters he brought into it. So interested was he in the practice of law that, despite his family obligations, he took that employment at a

salary less than the one he had been receiving.

In the beginning of his employment by Hemlock, respondent "handled" any matters assigned to him, but as time went on he developed "specialties" in commercial law, real estate and matrimonial matters. Other types of matters were handled by other employees, or by Hemlock, himself.

I have referred in the preceding sketch on Hemlock to the practice of law, as partners, by Hemlock, List, Hoffer and Becker, while the three last named were, in truth, employees of Hemlock, until they entered into a written partnership agreement which took effect on January 1, 1969.

Hoffer is an unpaid arbitrator on the matrimonial panel of the American Arbitration Association; he has been active in his Temple, as well as a member of its Men's Club and of its Board of Directors, and is active in community affairs, especially education.

Hoffer has a wife and three children, a son aged 16, and two daughters, aged 9 and 13, respectively.

Hoffer testified: "We have all suffered"; the children have been "taunted" by other children; his wife has been "harried and sleepless", and has become "a shell of what she was", and, said respondent, "I am not the same way I was. My health has suffered to an extent."

In July 1974, Hoffer's doctor advised him that his pericarditis -- inflammation of the sac around the heart -- might have been exacerbated; he was hospitalized for emergency

treatment two weeks prior to his testifying here as a result of a "recurrence of his pericarditis", which his doctor attributed to "tension and stress", and on one day during the hearings he was unable to attend because of his ill-health. His doctor's certificates are among the letters submitted herewith.

Respondent pointed out that he was unable to present "judges and high public officials" to testify in his behalf to his character because he was never involved in politics or with any public officials; he had not been close enough to anyone of that type "to come and speak for me".

Hoffer testified: "I love my practice. I love the work. I hope I may be permitted to continue to practice law."

Respondent has never before been the subject of a disciplinary proceeding.

SCHEDULE B

CHARACTER EVIDENCE

Each of the respondents introduced extensive evidence of his good character and reputation, some of it by witnesses who appeared in person, and the rest of it by letters which were received in evidence by consent, in lieu of personal appearance by the respective writers. To describe that testimony would merely extend the pages of this report to no purpose, because it would take the Court longer to read such a description that it will to read the evidence itself. Suffice it to say, for present purposes, that the evidence comes from judges, rabbis, court attaches, lawyers, clients, friends and neighbors, qualified by personal knowledge and association to know the respective respondent's reputation.

To summarize, Hemlock's affiants refer to him as a very honest gentleman, truthful, of integrity and decency, moral and upright, diligent, conscientious, dedicated, willing to work without fee, tolerant, generous, highly professional, active in communal and charitable affairs, of great compassion and feeling, a classic example of an understanding lawyer, whose word is his bond, meticulously fair and a man whose reputation is of the highest.

Hoffer is described as a man of great integrity, one who loves the law, very honest and absolutely truthful, trustworthy and dedicated, a conscientious, exemplary and creditable

person, a righteous individual, ethical and of high moral character, a humanitarian, truly good, kind and honest, one active in communal and religious affairs and one who would serve without fee. Hoffer's affiants stress particularly his love for, and his devotion to, his mother, his wife and his children and the sacrifices he has made for them, the anguish he and his family have suffered, and the physical deterioration in respondent and his family during the past four years as a result of his trial and conviction.

The letters in reference to Hemlock are bound in a volume which is Ex. B herein; those referring to Hoffer are in a separate volume, Ex. M herein.

Since the conclusion of the hearings, I have received the following letters:

In reference to Hemlock, one, dated November 12, 1974, from Congressman Herman Badillo;

In reference to Hoffer: one, dated November 11, 1974, from Julius L. Samuel; one, dated November 10, 1974, from David Piel; one, dated October 18, 1974, from Dr. Melvin L. Weidman, and one, dated November 11, 1974 from Dr. Martin L. Heilbraun.

Pursuant to consents given at the hearings, I am receiving these letters in evidence and putting them with the letters received during the hearing, i.e., the one in reference to Hemlock in the volume designated Ex. B, and those in reference to Hoffer in the volume designated Ex. M.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA :

v. :

72 CR. 1365(MP)

HARRY HOFFER, :

Defendant-Petitioner. : #45422

----------x

DECISION

APPEARANCES:

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
By: W. Cullen MacDonald,
Assistant United States Attorney

RALPH S. NADEN, ESQ.
Attorney for Defendant-Petitioner
253 Broadway
New York, N.Y. 10007

MILTON POLLACK, District Judge.

Milton Pollack, District Judge.

The defendant, Harry Hoffer, moves pursuant to Rule 33 Fed. R. Crim. P. for an order setting aside his June 1973 conviction of conspiracy and fraud and for a new trial on the grounds of newly discovered evidence and denial of the effective assistance of counsel in his defense.

In June 1973, Hoffer was found guilty by a jury of conspiracy; foreign transportion of money stolen or obtained by fraud; use of a fictitious name in carrying out a scheme to defraud by mail; and mail fraud. Each of his co-defendants at the trial, Messrs. Frank, Hemlock, and Berman, was also found guilty of some or all of these crimes.

The Court of Appeals upheld the conviction (United States v. Frank, 494 F.2d 145 (2d Cir. 1974) (Op. per Friendly, J.) and review in the Supreme Court was denied on October 14, 1974 (Hoffer v. United States, 419 U.S. 828 (1974)). Hoffer received a jail sentence, as modified, of 18 months imprisonment under which he served from September 17, 1975 to June 9, 1976 when he was paroled; the parole supervision is to end on March 16, 1977.

Hoffer voluntarily elected not to testify at his trial. Since his conviction Hoffer has repeatedly asserted that he did not participate in the spoils of the fraud as suggested by testimony of a government witness but, in fact, only his co-defendants had shared therein. Since the trial Hoffer has obtained documentation thereof. If he had taken the stand at the trial he could have so told the jury and he could also have told the jury that although the transactions were suspect he did not know what was going on or that his role was that only of an innocent dupe. He says that he wanted to testify but that his lawyer dissuaded him from taking the witness stand in the service of the personal interests of the co-defendant Hemlock who was deeply involved because Hemlock had paid Hoffer's legal fees.

Except for the current addition of charges against his trial lawyer, Hoffer has on several prior occasions asserted the same theme, that he did not share in the proceeds of the swindle. He asserted this in 1973 in connection with the sentencing proceedings, again in connection with an application made in 1974 to reduce or

modify his sentence, and again on this motion for a new trial made in November 1976.

In 1973 Hoffer told the probation officer for purposes of the presentence report the following:

> Notwithstanding, I want to state two things -- I did not receive one penny, not one dime ... The other thing -- I was accused of various actions. Whatever I did I was employed by Mr. Hemlock and did at his instruction. He told me that the defrauded party had full knowledge ... I'm a schlepp-along. I was dragged along -- whether you want to call it stupidity or allegiance.

¶After his unsuccessful appeal of his conviction Hoffer applied for a modification or reduction of sentence the papers again reiterating the absence of personal profit to him from the swindle. No suggestion was made by him then that his failure to take the witness stand on his own behalf was due to tainted judgment of his counsel.

The nub of the motion to modify the sentence, apart from claim of hardship was summarized by Hoffer's attorney as follows:

> It is urged that in reexamining the petitioner's sentence, the Court may now take into consideration sworn statements which are uncontroverted that show

> conclusively he had no knowledge of any wrong-doing. For that reason, Harry Hoffer has set forth in detail, under oath, crucial facts which show that he had no knowledge of any alleged fraud perpetrated against Mrs. Dominguez. He has previously asserted to this Court that he never received any funds from this transaction, a fact never disputed by the government. In his affidavit, Harry Hoffer swears that he was never an owner of any time deposit accounts in the names of Columbia Corporation, Ltd. or Splindian Investments, Ltd., or for that matter, any other time deposit account maintained in the Bahamas. The bank records in the Bahamas will verify this.

This motion for a modification of sentence was successful to the extent that Hoffer's prison term was reduced in August 1975 from three years to eighteen months for reasons not pertinent hereon.

Disbarment proceedings had been instituted against Hoffer and Hemlock in 1974 and hearings were held before a State Court Referee. In those proceedings Hoffer was represented by John McGillicuddy, Esq., who had represented Berman, a co-defendant, prior to the trial and again on appeal of this case. Although McGillicuddy had been present at the joint strategy meeting of counsel with Hemlock and presumably was aware of all that occurred there, no suggestion was

made in the disbarment proceedings at which Hoffer called his trial lawyer to testify for him, that the independent integrity of the lawyer had been corrupted.

In the present application brought by a fifth attorney Hoffer recites that in the 1974 disbarment proceedings he obtained an acknowledgment from the Nassau bank in which the spoils were deposited that Hoffer was not authorized to draw on the accounts and that this is newly discovered evidence.

Additionally, Hoffer now accuses his trial lawyer of not having adequately cross-examined the bank personnel who testified at the trial and of not having presented any defense for Hoffer, because in Hoffer's opinion, "his trial lawyer's interest was 'in helping Alfred Hemlock in his defense'", "a clear violation of my Sixth Amendment right to counsel".

In his affidavit in support of the present motion Hoffer recites the manner in which his lawyer was retained:

> Hemlock stated to me that since he was primarily involved and had made money on the Dominguez transactions, whereas I had not profited at all, he would assure payment for the legal services that I would require. He told me that he would approach co-defendants

> Steven Berman and John Frank to see if they would contribute toward the cost of my lawyer's services.
>
> Hemlock and I consulted with Mr. LaRossa, who indicated that his fee would be $15,000. Mr. Hemlock agreed, and told Mr. LaRossa that he would represent me. I paid no money at all for those legal services; I believe that Mr. Hemlock paid the full costs on my behalf.

The supporting affidavit of Hoffer's present attorney expands Hoffer's affidavit with the conclusory statement that Hoffer's trial counsel

> was paid by Alfred Hemlock, and who was requested to keep Hoffer off the witness stand because Hoffer would have furnished testimony that would have buttressed the government's case against Alfred Hemlock and would have exculpated himself.

And the present attorney concludes with the charge that

> because his attorney was paid by the co-defendant, no case was put in for him at all, in a matter in which there was a substantial defense case to be made.
>
> At Hoffer's disbarment proceedings Mr. LaRossa, Hoffer's trial lawyer testified that
>
> I strongly recommended to Mr. Hoffer that he not take the stand in his own defense for a number of reasons.
>
> The first is I had very serious doubts about whether his implication within the conspiracy had been proved to a legal satisfaction.

In addition to that, I believed that even if the judge did send the case to the jury, the jury would have difficulty in believing the testimony of the complainant.

The third reason is that Mr. Hoffer was, in my opinion, a nervous individual, and based upon his nervousness, I did not think that he would be presented to a jury in as good a fashion as he did when he was having a conversation with two or three individuals. For those reasons, I strongly suggested that Mr. Hoffer not take the stand in his own defense.

At the disbarment hearing Hoffer tersely stated:

"I was advised not to take the stand and stupidly I did not."

Amplifying his reasons he said:

Q. Would you give the Referee that reason?
A. Yes. Up to that point I had never handled any criminal matters in my entire legal practice. I was represented by an attorney who was familiar or had knowledge or was involved in cases in the -- in criminal cases in the Federal Court. I told him that I wanted to testify and he told me, and my wife who was also there, that in his opinion he didn't believe that the government had proved a case, had introduced sufficient evidence and therefore he said, "I don't believe you should testify."

It was a judgment that I regret to this day but it can't be reversed, that I didn't testify. I wanted to, but, you know, the old expression, someone who represents himself has a fool for an attorney and especially --

Hoffer's affidavit on the present motion re-

iterates:

> Relying on his (Mr. LaRossa's) strongly stated opinion, I did not testify at trial ... My position, therefore, is not that I received ineffective assistance of counsel but that -- in substance -- I was not represented at all.

Annexed to the moving papers are affidavits of two of the convicted co-defendants, Steven Berman and John J. Frank.

The Frank affidavit is no more than a recitation of hearsay attributed to Hemlock and Berman. He expresses nothing of personal knowledge and was not present on any occasion where LaRossa was also present and reports no conversations by or with LaRossa. The only contact that Frank reports with Hoffer is of a statement by Hoffer that he wanted to testify in his own behalf because he felt he had nothing to hide.

Berman's affidavit states that he was present at a joint luncheon and strategy discussion during the trial at Gasner's Restaurant with McGillicuddy, Direnzo, LaRossa, and Hemlock. He states that LaRossa told the group that Hoffer was insisting on testifying and would tell the truth, as he saw it, about the case; that it was then

decided that the defendants would rest and put in no defense; that LaRossa said that he would convince Hoffer that the government case was very weak and no defense need be introduced; and that LaRossa stated that if Hoffer testified "we would all be convicted with the possible exception of Hoffer."

Subsequent to the date of the Berman affidavit an illuminating set of letters from Berman was received by the prosecutor, AUSA Cullen MacDonald, dated respectively, November 3, 1976 and November 4, 1976.

In the first of the two letters Berman wrote

> I spoke to Gary last week and he mentioned to me the statements that John Frank and I gave Harry Hoffer. Neither of us meant to indicate that Harry was innocent of anything and would have been acquitted if he had been represented differently. At that time Hemlock's only concern was that Hoffer would make a deal with your office and plead guilty and then testify against us. Hemlock arranged through Mike Direnzo to get LaRossa and to convince Hoffer that he would be in better position if he went along with us. In fact Hoffer was far more culpable than Frank and I, as he had gone to Canada, arranged for the land, then went to Nassau and arranged all the details. John and I, while willing to go along did not know of the details themselves until Hoffer had arranged them. Hoffer met almost weekly with Mrs. Dominguez as he was advising her regarding her tax situation and he indicated to her that the land investment would be a tax boon for her.

At the time of the trial, Hemlock was concerned that Hoffer would fold up, and then testify for you. He was able to convince LaRossa to go along with the case until such time as your case was finished.

When you rested the government's case, LaRossa, Bender and my attorney [McGillicuddy] were convinced that there would not be any conviction, thus no defense was put in. We had a fairly heavy defense planned and then it was scrapped, as the three attorneys felt that enough reasonable doubt existed to insure at least a hung jury. No expert had testified as to the actual value of the land and we had one ready to go. I think that at the time of the deliberations, even you were not sure that a conviction was going to come out of the jury room.

John and I felt that Harry was going to use the statements as mitigation for the Bar association. I think that after serving only about 8 months and getting only a suspension from the bar he came out pretty well, all things considered. He was paid $25,000 at the time of the land deal and in addition got a law partnership from Hemlock which is still paying him plenty. All in all, he received more than any of us.

While it is true that LaRossa was hired by Hemlock and paid by the three of us, he did state that if he felt that the case was going badly, he would place Hoffer on the stand to mitigate his own position. (Emphasis added)

In his second letter to the Assistant United States Attorney of November 4, 1976 Berman stated

Both John and I are writing Naden [Hoffer's present attorney] to tell him that we cannot aid him, as anything that we could state would merely be hearsay, and be repeating what Hemlock told us. In addition, his client was at least as culpable as we were and more, since he actually carried out all the mechanics of the deal.

The affidavit of Mr. LaRossa on this application states that he was retained by Harry Hoffer; that at no time did he have a conversation with Alfred Hemlock involving the issue of keeping Mr. Hoffer off the witness stand because his testimony would be beneficial to the government's case; that at no time did he have a conversation with Mr. Hemlock, Mr. McGillicuddy, Mr. Direnzo or the defendant Stephen Berman with respect to the issue of Mr. Hoffer's testimony and the repercussions of his testimony to the other defendants; and that at no time did he have any conversation with Mr. Hemlock and Mr. Direnzo with respect to keeping Hoffer in line and keeping him from cooperating with the Government.

John M. McGillicuddy, Esq. was shown the affidavit of Stephen Berman dated June 3rd, 1976 and has supplied the following affidavit:

> With respect to paragraph 2 of said affidavit wherein it is stated that a conversation was had regarding securing an attorney for Harry Hoffer that could be controlled, the statement is false.
>
> With respect to paragraph 3 of said affidavit wherein it is stated that Harry Hoffer was prevented from testifying for the reasons therein assigned, the statement is false.

Michael P. Direnzo, Esq. was also shown the affidavit of Stephen Berman sworn to June 3rd, 1976. His affidavit hereon states that upon being asked for the name of a competent trial attorney versed in criminal law he suggested and recommended James LaRossa, Esq. He states further that "There was absolutely no mention, directly or indirectly, that Mr. LaRossa could or would be controlled."

Referring to the luncheon at Gasner's Restaurant Mr. Direnzo states that "there was no mention by Mr. LaRossa that if Mr. Hoffer testified all defendants would be convicted with the possible exception of Hoffer." That, "There were no discussions among Mr. Hemlock, Mr. LaRossa, and myself where the subject was 'keeping Hoffer in line and keeping him from cooperating with the government'. I did, however, have an occasion to state that I thought Mr. Hoffer would be a poor witness."

At the disbarment hearings it was McGillicuddy who elicited LaRossa's reasons for his recommendation to Hoffer that he not take the witness stand. These were solid, valid reasons and good professional strategy as

it appeared to the parties at the time. On the cross-examination of LaRossa he testified that he alone had made the strategy decision and that it was not as a result of a purpose among counsel to serve Hemlock. His testimony was that in his opinion the evidence was weak and none of the defendants could be convicted on the facts; and that there was no division among the defendants as to what the facts were or that they favored Hoffer over the others.

Hemlock's version of the Gasner Restaurant meeting was as follows (as given in the disbarment hearings)

> And at that time we all -- we thought that there was additional witnesses or some testimony would be put in. We felt, and I don't know -- I can't read anybody else's mind, but the consensus of opinion was that Mrs. Leon's testimony was incredible, and Mr. LaRossa spoke to Mr. Hoffer and Mr. Direnzo spoke to me, and said, 'We are not very certain that she has even proved a case. Although we don't know whether the -- we don't believe the Judge is going to dismiss the case. But we think the sum and substance is insufficient as a matter of law to prove a case.'
>
> ...
>
> And Mr. Hoffer in my presence -- and his wife was present, too. His mother happened to be there. But she wasn't in that conference. She was sitting through the trial, as well as my daughters.
>
> Mr. LaRossa expressed to Mr. Hoffer that in his considered judgment he believed they had not proved a case, and his advice and counsel was not to go forward in so far as a defense was concerned.

The Referee on the disbarment proceedings stated, after reviewing the substantial contacts that Hoffer had with the steps in the swindle, that to him

> The question is: Should Hoffer have believed what Hemlock told him:

The Referee's report concluded

> in my opinion it did not cause him to suspect, that his employer was engaged in a scheme to defraud Maria, and that he, Hoffer, was furthering it.

The Referee did not advert to the obligation of attorney Hoffer to the client whom he was serving so prolifically and what she had a right to expect from him in the circumstances and whether Hoffer was entitled to blindfold himself to avoid the obvious.

The viewpoint and assertions now contained in Berman's letters quoted above were apparently not called to the Referee's attention by Hoffer or those who appeared on his behalf as witnesses.

Suffice it to say, that on the trial evidence the jury could have concluded that Hoffer was heavily implicated in the fraud, and did so.

The Appellate Division to which the Referee reported his opinion that Hoffer was not guilty rejected this suggestion as beyond the scope of the Referee's function, ruling that

> However, we do not agree with the legal conclusions of the Referee couched as they are in terms of overcoming the presumption of guilt created by a criminal conviction.
>
> The teaching of Matter of Levy (37 N.Y.2d 279) is that the issue of guilt based on a prior conviction may not be relitigated,....

Hoffer's testimony at the disbarment proceedings is revealing and his admissions there show conclusively that testimony from him as to his intimate connection with the successive steps in the swindle, commencing from the search in Canada for a piece of property to use as a vehicle through to the deposit of the spoils in bank accounts which he opened in the names of dummy corporations as the assistant secretary thereof, would have implicated him by reason of the details even more inextricably than the government had shown. He admitted to the Referee the pivotal role he played in the steps taken in making the fraud scheme succeed; his testimony overall would not have been exculpatory, other than his

intended denial that his role had been knowledgeable or with the intent to further the swindle.

Hemlock told Hoffer in substance and effect that he was assigning Hoffer to handle the legal and business matters for a client. Hoffer, a lawyer, was entrusted with the interests of that client. He was told that she desired to remunerate the three, Hemlock, Berman and Frank, by allowing them to buy land located outside the United States and to resell it to her at a higher price and the difference would be applied toward their remuneration; the prospective difference being about $1,000,000., to be divided among the three equally. He was told that the closing would be outside the United States, in Nassau, because the client was an alien.

The Referee's report relates many of the intermediate and essential steps as told to him by Hoffer and other witnesses in the disbarment proceedings.

Hoffer questioned the circuitous methods involved in the land transactions and their purpose and asked Hemlock for the reason thereof but Hemlock ignored the inquiry, did not discuss it with Hoffer and, strangely, Hoffer

did not think it was his place to raise any further question about it "as a mechanic" (a lawyer-mechanic) "handling a real estate transaction" for a client whom he was representing.

Hoffer went to Canada to help find suitable real estate for the plan, to set up the needed personnel, legal and real estate, and to arrange the transactions.

Hoffer went to Nassau and arranged to procure two "inactive" Nassau corporate set-ups, Columbia and Splindian (the names of the dummy corporations) and had his co-defendants named as the stockholders, directors and officers and had himself appointed Assistant Secretary so he could handle things in Nassau. Hoffer opened the checking account for Columbia in Nassau, made the initial deposit of $5,000, arranged for the time and place of the closing of the purchase and sale by it of the Canadian land, deposited Mrs. Dominguez' moneys, drew checks for the selling price of the Canadian parcels and for legal fees and other fees and expenses incurred to the Canadian parties and then transferred the balance of his client's moneys to three separate time deposit accounts over which Hemlock, Frank and Berman respectively alone had power to

draw. Hoffer handled the post closing clearance of papers. He acted similarly with respect to another piece of Canadian property where Splindian was used in Nassau and he directed the Nassau bank to transfer the $150,000 net remaining in the Splindian account into two separate equal time deposits on which Hemlock and Berman alone had power to draw.

The testimony at the hearing showed that during the period from the deposit of the spoils in the bank until Hoffer set up the time deposits, he alone had authority over the money. Many more of the details of Hoffer's connection with the transactions were adduced. The trial record also contains much of the same.

To succeed on a motion for a new trial on the basis of newly discovered evidence, a defendant must show, inter alia,

> (1) that the evidence was discovered after trial, (2) that it could not, with the exercise of due diligence, have been discovered sooner, (3) that it is so material that it would probably produce a different verdict. United States v. Slutsky, 514 F.2d 1222, 1225 (2d Cir. 1975).

Hoffer's claim fails each of the foregoing tests. The evidence of those who were signatories for withdrawals from the Nassau accounts was

not a discovery or revelation to Hoffer -- he knew this all along because he had made the arrangements. The actual bank record would not have produced a different verdict; there were too many other steps that Hoffer was involved in for him to convince the jury to acquit him. His testimony that he was merely an unknowing dupe for the scheme of the other three would have collided with too much to be explained, at every step in the course of executing the transactions, to expect a jury to accept such a story from the law office associate assigned to the tasks by Hemlock, euphemistally denominated as the "mechanic on a real estate transaction." The additional evidence from the bank concerning the accounts and who was authorized and withdrew funds therefrom would have been most inconsequential under the facts and circumstances in the record.

Second guessing the trial strategy adopted does not aid a claim for a new trial.

In footnote 11 to its affirmance of the conviction, the Court of Appeals pointed out (494 F.2d at 153):

> Appellate counsel for Hoffer suggests that the decision of trial counsel not to call this defendant was based simply on a belief that, despite the contrary ruling of the trial judge, the government had not presented a sufficient case to warrant that course. Perhaps so, but the defendant is bound by the strategy that was chosen.

The Sixth Amendment claim is no better. Hoffer was not prejudiced by Hemlock's having paid LaRossa. This is not necessarily a disqualifying circumstance nor does it necessarily create a conflict of interest. In this case it was harmless to Hoffer. United States v. Wisniewski, 478 F.2d 274, 281-85 (2d Cir. 1973). Hoffer was present at and acquiesed in that arrangement -- voluntarily, without protest or reservation. Cf. United States v. Armedo-Sarmento, 524 F.2d 591, 592 (2d Cir. 1975). No actual conflict of interests resulted therefrom.

As already indicated, the evidence he was "prevented" from giving, to wit -- his testimony, would in all probability not have produced a different verdict. Hoffer would have been convicted in any event, in the Court's judgment.

Any suggestion of an omission to defend Hoffer's interests is forcefully negated by the record which shows his trial counsel's aggressive, incisive and very competent

and thorough cross-examinations of the government's witnesses. It was largely due to the leading role that LaRossa took in attacking the government's case that caused the defendants and their counsel to be of the view that the government's case had been weakened to the point of justifying the hope and expectation by them of a verdict for defendants, without more. Nothing was left unexplored that had any material bearing. Hoffer was effectively represented and his right to counsel was not undermined or impaired at trial. Hoffer's appearance on the stand and being subjected to cross-examination step by step over the route of the land purchases and sales, handled to a major degree by Hoffer, could easily have undone what the attack on the government's case had accomplished.

After all is said, there was a gross swindle, an unconscionable depredation of the assets of a law office client and Hoffer was the associate of that office who was placed in charge of the client's interests and willingly followed instructions and carried out the significant details. Was he a knave or a dupe? His

lawyer made a bona fide judgment on the value of his testimony and appearance on the stand. He was free to accept or reject that judgment. There is no factual evidence of coercion or undue influence exercised to obtain his consent. Hoffer, a lawyer himself, understood both the rationale and finality of that trial strategy and decision. He and Hemlock both admit that each knowingly waived his rights to present other defense evidence including their own testimony at the joint conference with all of the defense attorneys. United States v. Armedo-Sarmento, cit. supra.

Hoffer, a lawyer, could not successfully escape a charge, as a minimum, of conscious disregard of whether the transactions were legitimate or not, with a high degree of awareness of their palpable irregularity. That was enough for a jury on which to draw inferences of guilt.

There is no factual evidence that the independent integrity of Hoffer's trial attorney or his decision was contaminated. No real conflict has been shown to exist on which to erect a Sixth Amendment contention.

United States v. Mari, 526 F.2d 117, 119 (2d Cir. 1975). The application hereon is addressed to the sound discretion of the Court. United States v. Costello, 255 F.2d 876, 884 (2d Cir.), cert. denied, 357 U.S. 937 (1958). There are no facts on which a Court could or should properly exercise its discretion in favor of a new trial.

A case which nearly parallels the present one is United States v. McCord, 509 F.2d 334 (D.C. Cir., 1974). In McCord, a convicted defendant in the Watergate case argued on appeal that his trial counsel's overriding loyalty to the White House had denied him effective assistance of counsel. Of the attorney's contacts with White House officials regarding such issues as financial support, clemency and "cocperation" the Court said

> At best they indicate only that McCord's attorney was consulting with the persons who arguably authorized the crime for which McCord was being tried and was [sic] allegedly involved in the same conspiracy that McCord himself was involved in, hardly evidence of a conflict of interest. (Id. at p. 352).

Hoffer's sentence took into consideration the fact that he was less culpable than his co-defendants. He is entitled to no further consideration. There is no factual or legal basis for setting aside the conviction for a new trial. Motion denied.

SO ORDERED.

December 8, 1976

Milton Pollack
U.S. District Judge

NADEN

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 21 day of Jan. ,19 77 at No. 1. St. Andrews Pl. NYC

deponent servied the within Appendix

upon U.S. Atty. So. Dist. of NY

the Plaintiff-Appellee herein, by delivering / true copy(ies) thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Plaintiff-Appellee therein.

Sworn to before me this
21 day of Jan. 1977.

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978